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SUPREME COURT, U.S.

No. 81-5634

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

RICKY WAYNE TISON and
RAYMOND CURTIS TISON,

Petitioners

v.

STATE OF ARIZONA,

Respondent

JOINT PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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QUESTION PRESENTED

1. Is it constitutional for Arizona to execute the petitioners for aiding and abetting in a felony murder when -- in the words of the Arizona Supreme Court -- they "did not specifically intend that the [victims] die, ... did not plot in advance that these homicides would take place, or ... did not actually pull the triggers on the guns which inflicted the fatal wounds..."?

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OPINIONS BELOW

The opinions and judgments of the Supreme Court of Arizona sought to be reviewed are not yet officially reported, but they are reproduced in the Appendix attached to this petition. The opinion in the case of petitioner Ricky Wayne Tison is reproduced as Appendix Exhibit A(1a). The judgment in the case of petitioner Ricky Wayne Tison is reproduced as Appendix Exhibit E (87a). The opinion in the case of petitioner Raymond Curtis Tison is reproduced as Appendix Exhibit B(36a). The judgment in the case of petitioner Raymond Curtis Tison is reproduced as Appendix Exhibit G(90a).

JURISDICTION OF THE SUPREME COURT

Petitioner Ricky Tison was convicted of murder, kidnapping, robbery, and theft of a motor vehicle in the Superior Court of Yuma County, Arizona, on February 27, 1979. Petitioner Raymond Tison was convicted of the same crimes in the Superior Court of Yuma County, Arizona, on March 6, 1979. Petitioners were both sentenced to death for the murders and to prison terms for the remaining crimes on March 29, 1979. (67a-69a).

On July 9, 1981, the Supreme Court of Arizona affirmed Ricky Tison's convictions and sentences. (87a). On the same day, the Court affirmed Raymond Tison's convictions and sentences. (90a). Timely petitions for rehearing submitted by both petitioners were denied on September 10, 1981, (89a, 92a), and this joint petition for writs of certiorari was filed within 60 days of that date.

Petitioners asserted below and assert here a deprivation of their rights as guaranteed by the United States Constitution. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV, Section 1 to the Constitution of the United States, in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

State Statutes

1. Ariz. Code 1939, 43-116, in part, Ariz. Rev. Stat. Ann. §13-139 (1956) (Repealed 1978).

> All persons concerned in the commission of a crime whether it is a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising or encouraging children under the age of fourteen years, lunatics or idiots, to commit a crime, or who, by fraud, contrivance or force, occasion the drunkenness of another for the purpose of causing him to commit a crime, or who by threats, menaces, command or coercion, compel another to commit a crime, are principals in any crime so committed.

2. Laws of 1912, Ch. 35, §25, Ariz. Rev. Stat. Ann. §13-140 (1956) (Repealed 1978).

> All persons concerned in the commission of a crime whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall be prosecuted, tried and punished as principals, and no other facts need be alleged in any indictment or information against such a person than are required in an indictment or information against a principal.

3. Ariz. Code of 1939, 43-2901, Ariz. Rev. Stat. Ann. §13-451 (1956) (Repealed 1978).

> A. Murder is the unlawful killing of a human being with malice aforethought.
>
> B. Malice aforethought may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart.

4. Ariz. Code of 1939, 43-2902, Ariz. Rev. Stat. Ann. §13-452 (Supp. 1957-1978) (Amended 1973) (Repealed 1978).

> A murder which is perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, deliberate or premeditated killing, or which is committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in the perpetration of, or attempt to perpetrate, arson, rape in the first degree, robbery, burglary, kidnapping, or mayhem, or sexual molestation of a child under the age of thirteen years, is murder of the first degree. All other kinds of murder are of the second degree. As amended Laws 1973, Ch. 138, §1.

5. Ariz. Code of 1939, 43-2903, Ariz. Rev. Stat. Ann. §13-453 (Supp. 1957-1978) (Amended 1973) (Repealed 1978).

> A. A person guilty of murder in the first degree shall suffer death or imprisonment in the state prison for life, without possibility of parole until the completion of the service of twenty-five calendar years in the state prison, as determined by and in accordance with the procedures provided in §13-454.
>
> B. A person guilty of murder in the second degree shall be punished by imprisonment in the state prison for not less than ten years. As amended Laws 1973, Ch. 138, §2.

6. Laws of 1973, Ch. 138, §5, Ariz. Rev. Stat. Ann. §13-454 (Supp. 1957-1978) (Repealed 1978) is reproduced in the Appendix as Exhibit I at pp. 105a-107a.

NOTE: The preceding statutes were those in effect at the time of the crimes for which petitioners stand convicted. They were then repealed and replaced when Arizona revised its criminal code, effective October 1, 1978.

STATEMENT OF THE CASE

A. Introductory Statement

This petition raises the same constitutional issue on which this Court granted certiorari in Enmund v. Florida, No. 81-532: whether it is constitutional to execute petitioners who were convicted of aiding and abetting a felony murder, but who -- in the words of the Arizona Supreme Court -- "... did not specifically intend that the Lyonses and Theresa Tyson die, ... did not plot in advance that these homicides would take place, or ... did not actually pull the triggers on the guns which inflicted the fatal wounds..." (32a-33a).

B. Statement of Facts

On July 30, 1978, petitioners Ricky Wayne Tison, then age 19, and Raymond Curtis Tison, then age 18, went with their older brother Donald to visit their father, Gary Tison, at the Arizona State Prison. (37a) Gary Tison was serving a life sentence for murder, as was a friend of his, Randy Greenawalt. (2a) Petitioners and their brother entered the prison about 9 a.m. and produced weapons from an ice chest. (37a) They passed a hand gun to Greenawalt, who was a trusty in the control room of that portion of the prison. (37a) The group then locked numerous guards and visitors into a closet, and walked out the front door about 9:30 a.m. (37a) They drove away from the prison parking lot, abandoned their car for a waiting white Lincoln, and drove away on back roads. (2a; Transcript of Trial of Ricky Wayne Tison, hereinafter cited as "Ricky's Tr.", 2/22/79, p. 462).

The evidence tended to show that the car in which the men were riding had a flat tire the night after the escape, and

that the men flagged down the next car which drove by in the early morning hours of August 1. (3a) The car was an orange Mazda driven by John Lyons. His wife, their two-year-old child, and their teenage niece, Theresa Tyson, were with him. (2a) When the car stopped, guns were drawn by the Tisons and Greenawalt, and both cars were driven several miles down a dirt road off the main highway. (3a; Ricky's Tr. 2/22/79, p. 463). The vehicles were then parked trunk to trunk, and the Tisons' possessions were put in the Mazda. (3a, Ricky's Tr. 2/22/79, p. 463). The Lyons' possessions were then put in the Lincoln, and John Lyons' money and weapons were taken. (3a; Ricky's Tr. 2/22/79, p. 478, Ricky's Tr. 2/21/79, p. 218). The Lincoln was then driven a little further into the desert. (3a; Ricky's Tr. 2/22/79, p. 463). Gary Tison and Greenawalt shot some holes in the Lincoln, and the Lyons and Theresa Tyson were placed in it. (Ricky's Tr. 2/22/79, p. 463). Gary then sent petitioners back to the Mazda for some water (Id.) Upon their return, Randy Greenawalt and Gary Tison shot the victims. (3a; Ricky's Tr. 2/22/79, pp. 463-64).

Gary Tison, Greenawalt, petitioners, and their brother Donald then drove away in the Mazda (4a). Petitioners later helped to purchase spray paint which was used to disguise the car. (4a; 48a). After a few days the Mazda was abandoned near Flagstaff, Arizona, and was replaced by a Chevrolet pick-up obtained through a friend of Randy Greenawalt's. (4a; 49a; Ricky's Tr. 2/21/79, pp. 302, 314).

They then drove to Colorado. While they were there, a young couple, James and Margene Judge, were murdered. (Joint Sentencing Hearing, 3/14/79, pp. 12-13). The group was in the Judges' van when apprehended. (2a; 38a; Joint Sentencing Hearing, 3/14/79, pp. 11-12). However, there was no evidence

that Ricky or Raymond played any part in the Judges' murder and neither has been tried for them.

Around 3:00 in the morning of August 11, the men came to a roadblock near Casa Grande, Arizona. The van slowed down and then accelerated through the roadblock. (2a, 74a). Shots were fired and two police cars chased the van to a second roadblock. (74a). Officers fired at the van as it ran the second roadblock and came to a stop in the desert. (2a, 74a). In the driver's seat the officers found Donald Tison, who has been shot in the head and later died of the wounds. (3a, 74a). The police found petitioners and Randy Greenawalt nearby in the desert. Gary Tison was found dead in the desert several days later. (3a, 74a).

Petitioners were tried jointly with Greenawalt in Pinal County, Arizona, for crimes occurring at the prison and the roadblock. They were each convicted of seventeen counts of assault with a deadly weapon, and one count each of aiding and assisting an escape, possession of a stolen motor vehicle, and unlawful flight from a pursuing law enforcement vehicle. In addition, Ricky Tison was convicted of taking prohibited articles into prison. (74a) Petitioners were given concurrent sentences of 30 years to life for each of the assaults. They were given sentences of four to five years for each of the other offenses, to be served concurrently with each other but consecutively to the assault sentences. (75a) The convictions and sentences were affirmed by the Arizona Supreme Court in State v. Greenawalt, et. al., 128 Ariz. 388, 626 P.2d 118 (1981), cert. den. ____ U.S. ____ (1981). The opinion is attached as Exhibit D of the Appendix.

Petitioner Ricky Tison was tried for and convicted of murder, kidnapping, robbery, and theft of a motor vehicle in Yuma

County, Arizona. Petitioner Raymond Tison was convicted of the same crimes in a trial immediately following Ricky's.[1] Petitioners then underwent a joint sentencing hearing before the trial judge. He sentenced them to death for the murders and to prison terms for the remaining crimes (67a-69a). Accompanying the sentence was a special verdict required by Arizona law containing the aggravating and mitigating circumstances found by the judge in imposing the sentences of death. (59a-65a, 105a). The aggravating circumstances found that pertained to the nature of the crime were precisely those found by the same judge when he sentenced Randy Greenawalt to death.

The Supreme Court of Arizona affirmed both petitioners' convictions and sentences. State v. Ricky Wayne Tison, No. 4612 (Ariz., filed July 9, 1981), attached as Exhibit A of the Appendix; State v. Raymond Curtis Tison, No. 4624 (Ariz., filed July 9, 1981), attached as Exhibit B of the Appendix. These judgements are those petitioners now seek to have reviewed by this Court.

C. How The Federal Constitutional Issues Were Raised and Decided Below

The issue of whether the death penalty is disproportionate under the Eighth Amendment to the United States Constitution for someone convicted of murder on a theory of vicarious liability was raised in a presentencing memorandum to the trial judge by petitioner Ricky Tison's attorney. (96a-104a). Petitioner Raymond Tison's attorney joined in the memorandum. (57a-58a). The trial judge resolved the issue by sentencing

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[1] Randy Greenwalt was also convicted of murder, armed robbery, kidnapping, and theft of a motor vehicle. He was sentenced to death for the murders and given prison sentences for the other offenses. His convictions and sentences were affirmed by the Arizona Supreme Court in State v. Greenwalt, 128 Ariz. 150, 624 P. 2d 828 (1981), cert. den. ___ U.S. ___, 50 S.L.W 3250 (1981).

petitioners to death while recognizing that they had been convicted under felony murder instructions. (64a, 69a). The issue was raised on appeal by both petitioners (Brief for Appellant, State v. Ricky Wayne Tison, No. 4612 (Ariz. July 9, 1981) pp. 93-97; Brief for Appellant, State v. Raymond Curtis Tison, No. 4624 (Ariz. July 9, 1981, pp. 88-92) and presented at length during the oral argument. The Arizona Supreme Court decided the issue adversely to both petitioners. (32a-33a, 40a).

REASONS FOR GRANTING THE WRIT

This case presents a major Eighth Amendment issue left open by Lockett v. Ohio, 438 U.S. 586 (1978), and presented by Enmund v. Florida, No. 81-5231; is it constitutional for the State to execute a person who concededly neither killed the victim nor intended the death of the victim?

Ricky and Raymond Tison have been convicted of murder under a combination of felony murder and vicarious liability rules. It is undisputed that they did not fire the fatal shots, intend the fatal results, or control the fatal events. Yet the Arizona Supreme Court has affirmed their sentences of death, stating "that they did not specifically intend that the Lyonses and Theresa Tyson die, that they did not plot in advance that these homicides would take place, or that they did not actually pull the triggers on the guns which inflicted the fatal wounds is of little significance." 32a-33a. Thus, this case squarely presents the issue left open by Lockett v. Ohio, 438 U.S. 586 (1978): whether "the death penalty is constitutionally disproportionate for one who has not been proven to have taken life, to have attempted to take life, or to have intended to take life". Id. at 609 n. 16. This Court has granted certiorari on this issue in Enmund v. Florida, 81-5321.

The Arizona court found it sufficient that Ricky and Raymond had "associated themselves with others who were willing to and had in the past committed savage, homicidal acts...", although one of the two "others" was their father; that the homicides "occurred as part of and in the course of the escape and continuous attempt to prevent recapture"; and that they

"stood by, armed with guns, while their companions slaughtered the Lyonses and Theresa Tyson." Lack of intent or participation in the actual killings were deemed "of little significance." Petitioners ask this Court to grant certiorari to decide whether a State must consider what a man did and what he meant to do before sentencing him to "the unique and irreversible penalty of death." Woodson v. North Carolina, 428 U.S. 280, 287 (1976) (footnote omitted).

If certiorari is granted, petitioners will provide this Court with a thorough argument, based on the Anglo-American history of the felony murder and aiding and abetting rules, against the application of the death penalty to the circumstances presented by this case.

They will argue that the sentences of death imposed on Ricky and Raymond Tison by the State of Arizona violate two separate but intertwined principles set forth by this Court. The first is that" ... in capital cases the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Id. at 304 (emphasis added). See also Lockett v. Ohio, supra, 438 U.S. at 605 ("Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases.") (emphasis added). Petitioners will argue that the opposite of individualized sentencing occurred in their cases. Ricky and Raymond Tison were convicted of murder under felony murder and vicarious liability rules. At the ensuing sentencing hearing, the judge was supposed to consider what particular statutory aggravating and mitigating

factors pertained to each of them, for the statute requires the judge to consider what "the defendant" has done. (106a-107a). However, the judge focused on aggravating circumstances which pertained to the actions of the actual killers, such as the heinousness of the murders and the fact that they were done for pecuniary gain, and applied them to Ricky and Raymond. (59a-61a). In reality, the trial court determined a sentence appropriate for the actions of Gary Tison and Randy Greenawalt and then imposed the penalty on Ricky and Raymond. Whether or not permissible in non-capital cases, petitioners will argue that such transferred culpability is inconsistent with Eighth Amendment standards for imposing "this most irrevocable of sanctions." Gregg v. Georgia, 428 U.S. 153, 182 (1976).

Moreover, the sentencing court's finding that petitioners have not satisfied their burden of proving that their role in the killings was "relatively minor" (63a-64a) raises important questions concerning the burden of proof on mitigating and aggravating factors at a capital sentencing hearing. If the petition for a writ of certiorari is granted, petitioners will argue that the Constitution requires the State to bear the burden of establishing that the defendant's role in the crime was sufficiently great to warrant the death penalty. They will contend that the State may not properly shift the burden to the defendants by requiring them to prove that their role was relatively minor.

Petitioners will argue that the second principle violated by Ricky's and Raymond's death sentences is that in capital cases the sentence cannot be "grossly out of proportion to the severity of the crime." Coker v. Georgia, 433 U.S. 584, 592 (1977). As noted above, this Court in Lockett explicitly reserved the question of whether death is a disproportionate

punishment for one not proven to have actually killed or intended death. However, the Court's opinions, both prior and subsequent to Lockett, have strongly implied that the penalty of death would be unconstitutionally disproportionate for one who has not himself killed or intended to kill. In Gregg v. Georgia, supra, 428 U.S. at 187, the Court stated that "...when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime." (footnote omitted) (emphasis added). In Coker v. Georgia, supra, the Court held that the death penalty "... is an excessive penalty for the rapist who, as such, does not take human life." Id. at 598 (emphasis added). In Lockett itself, the Court held that the sentencing authority cannot be precluded from considering any relevant mitigating factor and specifically identified "the absence of direct proof that the defendant intended to cause the death of the victim" and "the defendant's comparatively minor role in the offense" as factors the unconstitutional sentencing procedure had excluded from consideration. Lockett v. Ohio, supra, 438 U.S. at 608. Finally, in Green v. Georgia, 442 U.S. 95 (1979), the Court vacated a death sentence because evidence that the petitioner himself had not participated in the murder had been excluded as hearsay. The Court termed this evidence "... highly relevant to a critical issue in the punishment phase of the trial ..." Id. at 97 (emphasis added).

In Lockett, three of the Justices dealt directly with the operation of the disproportionality principle in such circumstances. Justice White concluded that "the infliction of death upon those who had no intent to bring about the death of the victim is not only grossly out of proportion to the severity of the crime but also fails to significantly contribute to acceptable, or, indeed, any perceptible goals of punishment."

Id. at 626. Therefore petitioners will argue that "... death may not be inflicted for killings consistent with the Eighth Amendment without finding that the defendant engaged in conduct with the conscious purpose of producing death ...." Id. at 628.

Justice Marshall agreed. "... [T]his 21-year old Negro woman was sentenced to death for a killing that she did not actually commit or intend to commit. ... The imposition of the death penalty for this crime totally violates the principle of proportionality embodied in the Eighth Amendment's prohibition." [citation omitted]. Id. at 620. Justice Blackmun, while preferring a "proceduralist tack", id. at 615, stated that "[i]t might be that to inflict the death penalty in some such situations would skirt the limits of the Eighth Amendment proscription, incorporated in the Fourteenth Amendment, against gross disproportionality. ..." Id. at 613-614. Ricky and Raymond Tison's cases do not merely skirt, but in fact far exceed these limits. Sandra Lockett's death sentence was vacated, although she "suggested ... robbing a grocery store and a furniture store" and warned that since the grocery store operator was a "big guy" who was armed, "they would have 'to get him real quick.'" She also volunteered to get a gun from her father's basement to aid in carrying out the robberies. Id. at 590. Subsequently, when these plans fell through, she "guided the others to a pawnshop," "agreed to proceed," and "... waited with the engine running." Id. After the murder, "she took the gun from the pawn shop and put it in her purse," later "placed the gun under the front seat," and hid two coparticipants in her attic. Id. at 590-591.

Ricky and Raymond Tison's lives are at stake, which of itself makes this issue a vital one for this Court to consider. However, the principle at stake will affect many other lives. No

one who has not personally committed a murder has been executed in this nation for twenty-six years. Id. at 624-625. (White, J., dissenting in part and concurring in the judgment). However, as of the date of the Lockett opinion, "...approximately half of the states ha[d] not legislatively foreclosed the possibility of imposing the death penalty upon those who do not intend to cause death." Id. This issue needs to be decided by this Court not only for Ricky and Raymond Tison, but for those in like circumstances whose cases may never be brought before this Court.

CONCLUSION

For the reasons stated above, Petitioners request that this Court grant their joint petition for writs of certiorari.

Respectfully submitted this the 27th day of October, 1981.

By: _____

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Counsel to Petitioners

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October Term, 1981

RAYMOND CURTIS TISON,

Petitioner

v.

STATE OF ARIZONA,

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Raymond Curtis Tison, who is now held in the Arizona State Prison, hereby asks leave of this Honorable Court to file the attached Petition for a Writ of Certiorari to the Supreme Court of Arizona without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

In support of this Motion, please find attached:

(1) A copy of Petitioner's Affidavit of Poverty, dated May 29, 1981, that accompanied a related case involving convictions not now before this Court;

(2) Counsel's Affidavit stating that, to the best of his knowledge and belief, petitioner's financial circumstances have not changed since petitioner signed the attached affidavit.

Because petitioner is in prison in Arizona and petitioner's attorneys are in Boston, it has been impossible for petitioner's attorneys to obtain a new affidavit of poverty in time for it to be filed with the accompanying petition. If necessary, a

new affidavit will be obtained and sent to this Court as soon as possible.

By _____

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Counsel for Petitioner

AFFIDAVIT OF POVERTY

STATE OF ARIZONA)
:ss.
County of Pinal)

I, Raymond Curtis Tison, being first duly sworn, depose and say that I am one of the Petitioners in the above entitled cause and I am a citizen of The United State; that in support of my motion to proceed with a Petition for Writ of Certiorari in The Supreme Court of The United States from The Judgment of The Supreme Court of The State of Arizona without being required to prepay fees, costs, or give security thereof, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; that I believe that I am entitled to redress, and that the issues which I desire to present on appeal are as follows:

I.

Did the totality of the circumstances indicate that the petitioners were denied due process of law in the jury selection process because of pretrial publicity?

II.

Were the petitioners denied due process of law in the jury selection process because the trial court seated jurors who held firm opinions that the petitioners were guilty of both the charges under consideration and other henious crimes not charged?

Further, I am presently in custody at The Arizona State Prison, Florence, Arizona, under the judgment and sentence of The Superior Court of Arizona in and for The County of Pinal, State of Arizona; that I have been in continuous custody since August 1978 when I was first arrested on this charge.

I have, during these almost three years of incarceration, received no income. I do not have any business, profession or other source of income at the present time. I do not own any cash other than small amounts provided to me by my relatives for spending; I do not have any money in checking or savings accounts, securities or other valuable property.

I do not have an interest in any real property. I have been represented by court appointed counsel from the date of my arrest.

I further believe in good faith that I am entitled to the relief I am seeking, understanding that a false statement in this Affidavit will subject me to penalties for perjury and I further swear that the responses which I have made in this Affidavit relating to my ability to pay the costs of prosecuting the Petition for Writ of Certiorari are true and correct. I therefore request leave to prosecute the proposed Petition for Writ of Certiorari in forma pauperis.

Raymond Curtis Tison

RAYMOND CURTIS TISON, being first duly sworn on his oath, presents that he has subscribed to the above and that the information contained therein is true and correct to the best of his knowledge and belief.

RAYMOND CURTIS TISON

Subscribed and sworn before me this 27th day of July, 1981.

Notary Public

My Commission Expires:

_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

RICKY WAYNE TISON and
RAYMOND CURTIS TISON,

Petitioners

v.

STATE OF ARIZONA,

Respondent

AFFIDAVIT OF ALAN M. DERSHOWITZ

Commonwealth of Massachusetts, ss.)
Middlesex County)

AFFIDAVIT

1. I am a member of the Supreme Court bar an am representing the petitioners in the instant petition and motion.

2. I have read petitioners affidavits of poverty prepared for submission with a prior petition involving a different conviction. I am aware of no change in their financial situation since that time.

Alan M. Dershowitz
20 Elmwood Avenue
Cambridge, MA 02138
(617) 661-1965

Sworn to and subscribed before me this 26th day of October, 1981.

Notary Public
My Commission expires 3/15/86

APPENDIX

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Part A

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Banc

FILED
JUL 5 1981
S. ALAN COOK
CLERK SUPREME COURT
BY

STATE OF ARIZONA,

Appellee,

v.

RICKY WAYNE TISON,

Appellant.

No. 4612

Appeal from the Superior Court of Yuma County
Cause No. 9299
Honorable Douglas W. Keddie, Judge

AFFIRMED

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STRUCKMEYER, Chief Justice

This appeal is by Ricky Wayne Tison from judgments of guilty and death sentences on four counts of first degree murder. He also appeals from judgments of guilty and sentences on three counts of kidnapping, two counts of armed robbery, and one count of theft of a motor vehicle. Jurisdiction of this Court is pursuant to A.R.S. § 13-4031.

On July 30, 1978, appellant and his two brothers, Raymond and Donald Tison, assisted in the escape of their father, Gary Tison, and Randy Greenawalt from the Arizona State Prison. Both appellant's father and Greenawalt were serving life sentences for murder at the time. Appellant's convictions for crimes arising out of the prison escape and subsequent capture twelve days later were recently affirmed by this Court. State v. Greenawalt, et al., ____ Ariz. ____, 626 P.2d 118 (1981).

The five men fled the prison in a green Ford. Later they transferred to a Lincoln Continental. The Lincoln was discovered on August 6, 1978 in Yuma County, Arizona near Quartzsite. In and around the vehicle were the bodies of John and Donnelda Lyons and their twenty-two-month-old son, Christopher. The body of a niece of the Lyonses, Theresa Tyson, was later found approximately one-fifth of a mile west of the Lincoln. All four had died from shotgun wounds.

The Lyonses had left Yuma on the night of July 31, 1978 on a vacation in a late model Mazda. A vehicle matching this description was subsequently discovered in Coconino County, Arizona near Flagstaff.

On August 11, 1978, the appellant, together with the other Tisons and Greenawalt, ran through two roadblocks south of Casa Grande, Arizona in a Ford van. After exchanging gunfire with police officers at the roadblocks, the van turned off into the

desert and stopped. Donald Tison was found in the driver's seat of the van. He had been shot in the head. Appellant, his brother Raymond, and Greenawalt were captured nearby in the desert. Gary Tison was found dead several days later further on into the desert.

This Court recently affirmed Greenawalt's convictions and sentences arising from the four murders near Quartzsite. State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828 (1981). Today we affirm Ricky and Raymond Tison's convictions and sentences for these crimes in this opinion and in the companion opinion of State v. Raymond Curtis Tison, ____ Ariz. ____, ____ P.2d ____ (1981) (No. 4624, filed this date).

After his capture, appellant made statements describing the prison breakout and subsequent activities, including the four murders. From these statements and other evidence introduced at trial, it was established that the breakout had been planned for some time. Appellant took an active part in the preparation, including obtaining guns and the Lincoln Continental. A gunsmith testified that appellant approached him about sawing off shotguns. The gunsmith also stated appellant, through his mother, purchased a .45 caliber Colt handgun from him. Two cartridges identified as having been fired from this gun were found near the murder scene.

Appellant in his statements explained that the Lincoln became disabled with a flat tire near Yuma. The Mazda was flagged down and all five men pulled guns on the Mazda's occupants, who were taken out of that car and placed in the Continental. Both cars were then taken down another road and parked trunk to trunk. Articles were exchanged between cars, and money and weapons belonging to John Lyons were taken. The Continental was then moved a short distance further, where Gary Tison and Greenawalt shot the victims.

The five men drove off in the Mazda. Within hours, appellant purchased paint to use on the Mazda. A few days later, the repainted Mazda was abandoned in the woods near Flagstaff.

The appellant first contends that a plea agreement which he had entered into should be specifically enforced against the State because, he asserts, he was willing to abide by the terms of the agreement. The agreement provided that appellant would plead guilty to one count of murder in the first degree for a recommended sentence of 25 years to life. In exchange, appellant would:

> "* * * appear and testify truthfully in any proceedings pertaining to criminal charges relating to an incident occurring on or about August 1, 1978 in which the John Lyons family and Theresa Tyson were killed."

Appellant thereafter gave statements describing his participation in the murders, but a dispute arose as to the scope of the testimony which he would give in subsequent proceedings. Consequently, appellant withdrew his plea of guilty. Raymond Tison, in response to questions from the trial judge, explained:

> "MR. RAYMOND TISON: Okay, the plea agreement says the incident. I figured they were talking about this incident going on up at Quartzsite. I had no idea that you were going to be asking about other people involved, about the escape, all this, and maybe what happened afterwards. I thought it was just going to be that incident. I would be happy to get up there and testify just to that incident, but that's it. I'm not involving nobody else. I'm staying right there. I will start from one time before we came there and before we left or to wherever we left.
>
> THE COURT: Is that your position also, Ricky?
>
> MR. RICKY TISON: Yes."

The appellant's position that the plea agreement should be specifically enforced against the State arises from his understanding of Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). There, the prosecution promised not to make a recommendation for sentencing in exchange for the accused's plea of guilty. At the sentencing hearing, the prosecutor appeared

and recommended that the maximum sentence be imposed, contrary to an earlier prosecutor's avowal that no recommendation as to the sentence would be made. The sentencing judge imposed the maximum sentence. The United States Supreme Court, in disapproving the practice, stated:

> "* * * when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 262, 92 S.Ct. at 499.

Accord, State v. Stone, 111 Ariz. 62, 523 P.2d 493 (1974). The Court vacated the judgment and remanded to the state court to either allow the defendant the opportunity to withdraw the plea or specifically enforce the agreement against the prosecution.

While the remedy of specific performance of the plea bargain was sanctioned in Santobello for the unkept bargains of a prosecutor, it has rarely been used. See Note, The Legitimation of Plea Bargaining; Remedies for Broken Promises, 11 Am.Crim.L.Rev. 771 (1973). And see United States v. Nathan, 476 F.2d 456, 459 (2nd Cir. 1973), where specific enforcement of a plea agreement was refused because the defendant failed to disclose the agreed information.

The appellant argues in spite of his failure to carry out the terms of the plea bargain that he should be entitled to specific performance. He asserts that he was compelled to withdraw from his plea of guilty because the agreement's scope had been too broadly construed by the prosecution. We disagree. By the terms of the plea agreement, appellant was to provide testimony "in any proceedings", which he has refused to do. His non-compliance with the plea agreement precludes him from the relief requested.

It is argued that the language of the plea bargain did not contemplate appellant's testimony as to the conspiracy and the

prison breakout, but neither did it explicitly limit his testimony to the events at the scene of the Yuma County murders. A guilty plea will not be set aside because of a "defendant's mistaken subjective impressions * * * absent substantial objective evidence showing such impressions to be reasonably justified * * * ", State v. Pritchett, 27 Ariz.App. 701, 703, 558 P.2d 729 (1976); see State v. Zarate, 106 Ariz. 450, 478 P.2d 74 (1970). Neither will a plea agreement be specifically enforced according to a defendant's unilateral interpretation of the terms of the bargain in the absence of objective evidence indicating that the interpretation is reasonably justified. See Adamson v. Superior Court of Arizona, 125 Ariz. 579, 611 P.2d 932 (1980). In State v. Cornwall, 114 Ariz. 550, 552, 562 P.2d 723 (1977), we held:

> "* * * it is the duty of all parties involved to insure that the agreement which is eventually filed with the court contains the exact and complete agreement, no more, no less. And because the requirement to have the exact agreement in writing before the court applies with equal force to the defense, we are of the opinion that, had the defendant wished to plead under a different agreement or had he wished the inclusion of terms and conditions not already contained therein, it was incumbent upon him to object and to require the exact agreement to be evidenced in writing * * *."

It is also appellant's contention that the State did not prove he breached the terms of the plea agreement and that an evidentiary hearing on this question should have been conducted by the court below. We think, however, that the State has satisfied its burden of proof because the unequivocal refusal to testify by the appellant establishes a breach of the plea bargain. Moreover, the claim of error because of the failure to hold an evidentiary hearing on this question is waived since it was not requested in the court below. See State v. Coward, 108 Ariz. 270, 496 P.2d 131 (1972).

Appellant urges that the trial court erred in not appointing an expert to conduct a public opinion survey to support appellant's motion to change venue. Our statute provides for the appointment of experts in capital cases when such experts are reasonably necessary to adequately present a defense. A.R.S. § 13-1673(B) (now A.R.S. § 13-4013(B)). Constitutional considerations may also mandate the appointment of investigators to aid in preparing a defense. See Mason v. State of Arizona, 504 F.2d 1345 (9th Cir. 1974); State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977). But there was no error here in the denial of an expert to conduct a public opinion survey since the expert's findings would have no "bearing on the ultimate question of * * * guilt or innocence" and therefore the expert was not necessary to the preparation of a defense. State v. Smith, 123 Ariz. 231, 237, 599 P.2d 187 (1979); see State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828, 833 (1981); State v. Powers, 96 Idaho 833, 537 P.2d 1369 (1975).

Appellant urges that the trial court erred in its failure to excuse for cause a juror who expressed an opinion as to the guilt of appellant. On voir dire, the juror first noted that she had been especially moved by the killing of the child and she then expressed a belief that appellant was guilty. But she responded affirmatively when asked if she could judge the case on the evidence presented. When she was challenged for cause, this exchange occurred between the prosecution and the trial judge:

> "MR. IRWIN: Your Honor, we think that Mrs. Jackson should be permitted to stay on the jury. That is a fact, of course, that she evinces some emotion. A person wouldn't be a normal person if they didn't. She indicated that she would be able to set aside evidence she had seen in the newspapers, read about, heard about, and try the case fairly on the evidence presented in the courtroom.

THE COURT: Yes, I understood Mrs. Jackson to state that she could judge the case on the evidence produced in the court. The challenge is overruled."

The appellant attacks our decision in State v. Narten, 99 Ariz. 116, 407 P.2d 81 (1965), as denying him due process because it permits jurors with a preconceived notion of the guilt or innocence of the accused to sit on the jury. In Narten we held that jurors possessing an unqualified opinion should be disqualified because it would necessarily carry over and affect their ultimate decision in the case. The fact, however, that a prospective juror possesses an opinion or belief regarding the guilt of the defendant does not mean that the juror would be influenced by that belief and could not render a fair and impartial verdict. See Burnett v. State, 34 Ariz. 129, 268 P. 611 (1928). See also State v. Greenawalt, et al, ____ Ariz. ____, 626 P.2d 118, 123-124 (1981). The responsibility for determining whether a juror can render a fair and impartial verdict lies with the trial court, and we will not disturb that exercise of discretion absent a clear showing of an abuse of discretion. State v. Rose, 121 Ariz. 131, 589 P.2d 5 (1978). The trial judge was satisfied that the juror could deliberate and render a fair and impartial verdict. Without a showing of unqualified partiality of the juror, we will not upset a determination so clearly within the province of the court.

Appellant argues that the trial court improperly denied various pretrial motions urged by appellant. The determinations of these motions also rests within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion and resulting prejudice to the defendant. State v. Greenawalt, et al, ____ Ariz. ____, 626 P.2d 118 (1981); State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828 (1981).

Appellant's position is, first, that the trial court erred in refusing to grant a motion for change of venue because of the pretrial publicity.

Rule 10.3(b), Rules of Criminal Procedure, 17 A.R.S. provides:

> "Whenever the grounds for change of place of trial are based on pretrial publicity, the moving party shall be required to prove that the dissemination of the prejudicial material will probably result in the party being deprived of a fair trial."

The trial judge learned through voir dire that all of the potential jurors who were needed to obtain a panel of 34 had some familiarity with the events in question. Mere knowledge of the facts of a case standing alone does not mandate a change of venue. See State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828 (1981). It must be shown that prejudicial publicity had the probable effect of precluding a trial by fair and impartial jurors before a change of venue is required. Id. Appellant failed to make such a showing. The jury selection process took only a relatively short amount of time. Forty persons were called and only four of those had formed an unqualified opinion as to defendant's guilt. The probability that the members of the jury were prejudicially affected by pretrial publicity is not supported by a review of the record.

In a similar vein, appellant asserts that the trial court erred in its denial of his motions for change of venire and a continuance because of the pretrial publicity. We find no evidence to support his position and the trial court's determination in this regard will not be upset.

Appellant asserts error because the trial court failed to have the jury sequestered. However, the record does not show either juror misconduct or a failure of the jury to follow the admonitions given by the trial judge. Id. at 840.

Appellant asserts that the trial court improperly refused to permit voir dire of each individual juror. The responsibility

for conducting voir dire examination lies with the trial judge. The court in its discretion may permit counsel to examine an individual juror when good cause appears. State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828, 839-840 (1981); State v. Smith, 114 Ariz. 415, 561 P.2d 739 (1977); Rule 18.5(d), Rules of Criminal Procedure, 17 A.R.S.

In the case at bar, the trial judge advised counsel for the appellant that he would be allowed to specifically question prospective jurors once the voir dire examination was completed by the trial judge. The trial judge extensively questioned the prospective jurors in the areas of pretrial publicity, awareness of the appellant's background, any alleged statements attributed to the appellant, and the existence of any prior opinions as to guilt. The trial judge then permitted appellant's counsel to ask questions, and eight of the prospective jurors were questioned by him. We do not understand how the appellant was prejudiced by this procedure. The method adopted by the trial court adequately accomplished the purpose of voir dire to determine whether prospective jurors can fairly and impartially decide the case. State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828, 840 (1981).

Appellant urges that he was deprived of a fair trial guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution because of the pretrial publicity in this matter. He urges first that the newspapers engaged in a practice of "unchecked and irresponsible journalism" creating a carnival-like atmosphere, precluding the possibility of a fair trial as was condemned in Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).

In State v. Smith, 123 Ariz. 231, 599 P.2d 187 (1979), we recognized that the mere dissemination of biased news accounts

may so influence the community as to pervade the proceedings and that prejudice would be presumed. However, there still must be shown circumstances so outrageous that it can be concluded the trial was conducted in less than a solemn and sober manner. State v. Greenawalt, et al, 626 P.2d 118 (1981); see Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). The record fails to disclose the existence of such outrageous circumstances. It does not appear that the trial was conducted in a manner other than solemn and sober. In the absence of circumstances from which prejudice can be presumed, appellant must show that specific publicity of a prejudicial nature reached the prospective jurors. State v. Greenawalt, et al, ____ Ariz. ____ 626 P.2d 118 (1981); State v. Smith, 116 Ariz. 387, 569 P.2d 817 (1977).

An examination of the record leads to the conclusion that during the occurrence of the events in question, especially after the escape from the state prison and after the appellant's implication in the murder of the Lyons family, press coverage was very extensive. While the hunt for the Tisons was in progress, appellant and his accomplices were the subject of numerous front page articles. However, the degree of press interest lessened after the discovery of the body of Gary Tison, the group's reputed leader. The record does not show that prior to the trials of Randy Greenawalt and appellant and his brother, Raymond, the press coverage rose to the level it occupied at the time the offenses occurred. But were it otherwise, the magnitude of the publicity will not alone result in a reversal. There must be a showing by the accused of some prejudicial effect of the publicity. State v. Greenawalt, ____ Ariz. ____, et al, 626 P.2d 118, (1981).

The presence of publicity-caused jury prejudice can usually be found by an examination of two common factors: the nature of the publicity and the difficulty in selecting a jury. Neither factor is present to the extent that would tend to indicate the presence of prejudice. The pretrial publicity not only tapered off near the appellant's trial date, but, in addition, only a few of the many newspaper articles that were written could be said to be inflammatory. Of those, the articles appearing on the editorial page of the Arizona Republic, a Phoenix newspaper, were the most incendiary. Only one juror who participated in the deliberations read the Arizona Republic, and that person stated that he had not formed any preconceived opinions as to the appellant's guilt.

The relative ease with which the jury selection process took place is also indicative of a lack of prejudice. Only 40 prospective jurors were needed to fill the requisite panel of 34. Of these, only four were excused by the court for their fixed opinion of the appellant's guilt. Of the 34 on the panel, none had formed any preliminary opinions about the case, nor had any of them heard of any alleged statements made by appellant, his brother, or Randy Greenawalt, nor did those on the panel possess any knowledge of the prior history and background of appellant. Unless there are objective indications of jurors' prejudice, we will not presume its existence.

In his sixth assignment of error, appellant claims that the trial court erred in failing to suppress three incriminating statements which were made by appellant subsequent to his capture and while incarcerated at the Pinal County Jail in Florence, Arizona. He urges several grounds for the exclusion of these statements, including assertions that they were obtained in

violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), and the Sixth Amendment right to counsel. We will not, however, concern ourselves with these matters because of the failure to raise these issues at the suppression hearing held in the court below. Issues concerning the suppression of evidence which were not raised in the trial court are waived on appeal. State v. Griffin, 117 Ariz. 54, 570 P.2d 1067 (1977); see Rule 16.1(c), Rules of Criminal Procedure, 17 A.R.S. The preclusion of issues applies to constitutional objections as well as statutory objections because an adherence to procedural rules serves a legitimate state interest in the timely and efficient presentation of issues. State v. Griffin, supra; State v. Neese, 126 Ariz. 499, 616 P.2d 959 (App. 1980); see Michigan v. Tyler, 436 U.S. 499, 512, n. 7, 98 S.Ct. 1942, 1951, n. 7, 56 L.Ed.2d 486 (1978). When a defendant chooses legal representation, the power of decision is delegated to the lawyer, see Standard 4-5.2, Standards for Criminal Justice, and his decisions may be binding upon the defendant, even though rights of constitutional dimensions have been lost. See Wainwright v. Sykes, 433 U.S. 72, 91, 97 S.Ct. 2497, 2509, 53 L.Ed.2d 594 (1977)(Burger, C.J., concurring); Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); Henry v. Mississippi, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965). Thus, the challenge to the admissibility of the statements on the grounds of involuntariness preserved for review only that issue.

An examination of the voluntariness of the statements given by appellant requires a further elaboration of the facts.

On August 11, 1978, in the early morning hours, a Ford van approached a roadblock set up near Casa Grande, manned by a number of law enforcement officers. When the officers attempted to check the vehicle, gun shots were fired from it. Thereafter,

a high speed chase ensued for eight to ten miles, with gunfire coming from the rear of the van. At a second roadblock, the van was stopped after running off the highway. The officers saw several of the occupants fleeing into the desert, and upon searching the van found Donald Tison, who was unconscious with a gunshot wound in his head. Later, with the assistance of helicopters equipped with search lights and aerial flares, the officers located and arrested appellant, his brother Raymond Tison and Randy Greenawalt hiding a short distance from the van. After being stripped, searched, handcuffed and shackled, they were placed in the bed of a pickup truck while the officers continued their search for Gary Tison.

At 5:30 a.m., appellant was placed in a police vehicle along with three officers (Harville, Solis and Martinez). At that time, appellant was nude except for a blanket which had been put over him. Appellant had blood spattered on his chest, apparently from the gunshot wound sustained by Donald Tison. Appellant was advised of his Miranda rights and asked about his physical condition. He responded that he was all right and did not need a doctor. During this time he was neither threatened nor intimidated in any manner. There was some evidence that a statement was made to the appellant that he would be taken back and shown his brother, Donald. Appellant was questioned for a period of approximately ten to fifteen minutes. The interview terminated when appellant failed to disclose the information which the officers were attempting to obtain.

The second interview was conducted by Department of Public Safety Officers Salyer and Sanchez at approximately 7:00 a.m. The appellant was still nude, but in possession of the blanket. He was placed in the back seat of a vehicle in which the two officers sat in the front seat. Appellant was advised of his Miranda rights and "he just shrugged his shoulders" and began to talk. Officer

Salyer's testimony at the trial indicates what transpired:

> "A. Well, first I asked Ricky if he was okay, if he was hurt, if he needed any medical attention. He stated no. I offered him some coffee, something to eat. Again he refused.
>
> Q.[sic]: My one concern was to ascertain if Gary Tison was in fact with the group and the location of the girl that hadn't been found.
>
> As I talked to Ricky about the -- he first stated all they did was break the old man out. As I got to the point about the white Lincoln he became very excited. Said he didn't want to talk anymore. Didn't know anything about the Lincoln.
>
> At this time I started to get out of the car when someone came by and mentioned something about footprints.
>
> Q. Did you return to the car at that time?
>
> A. I hadn't left the car.
>
> Q. What did you say at that time?
>
> A. I told Ricky that there had been footprints found around the scene of the Lincoln and I asked him about what type shoes he was wearing. Again he became excited, said, 'All I know is that me and my brothers didn't shoot those people.'
>
> Q. What was your next statement?
>
> A. I said, 'Okay, I didn't say that you shot those people. I'm just trying to find out what happened.'
>
> I said, 'Let's just start at the beginning from when the thing first started and just go from there.'"

Appellant then related in some detail their activities, including a description of the murders of the Lyons family.

The third statement of appellant which was introduced at his trial occurred at the Pinal County Jail on the same day at approximately 12:40 p.m. Tom Brawley, of the Coconino County Sheriff's Office, questioned appellant. At this time he was neither wearing clothes nor did he have a blanket. He was advised of his Miranda rights and was not threatened in any manner. Brawley testified:

"A. I asked if he wanted to make a statement.

Q. What was his response?

A. He said that he didn't at that time.

Q. What happened next?

A. I then told him that we had a missing person in the case that we would like to find.

Q. What was his response to that?

A. He replied, 'Well, that's a bunch of shit about the girl.' He said, 'We didn't --' or he said, 'I'm not a sex fiend,' He said, 'We didn't take her with us. We left her there at the car.'"

Counsel for appellant at the hearing on a motion to suppress urged that the statements were inadmissible because of their involuntary nature.

In Arizona, confessions and admissions are prima facie involuntary and the burden is on the State to show by a preponderance of the evidence that they were freely and voluntarily made and not the product of physical or psychological coercion. The trial court's determination of the admissibility of a confession will not be disturbed in the absence of clear and manifest error. State v. Hall, 120 Ariz. 454, 586 P.2d 1266 (1978).

In determining the voluntariness of a confession, the trial judge must assess the totality of the circumstances surrounding the confession and decide whether the free will of the defendant has been overborne. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); State v. Hall, supra. "A confession will be found involuntary where the court, considering all the circumstances, determines that one of the following exists: (1) impermissible conduct by police, (2) coercive pressures not dispelled, or (3) confession derived directly from prior involuntary statement." State v. Gretzler, 126 Ariz. 60, 82, 612 P.2d 1023 (1980). None of the factors enumerated in Gretzler exist in the

present case. We find no clear and manifest error in the trial court's denial of the appellant's motion to suppress.

An examination of the circumstances surrounding the giving of appellant's statements supports the trial court's conclusion that they were voluntary. He chose to speak on three separate occasions after having been advised of his Miranda rights. The law enforcement officers who conducted the interrogations never threatened or coerced him, nor did they promise any benefits from his cooperation with them. The questioning lasted for only short periods of time. The officers provided appellant with a blanket and offered him medical attention and food. Considering all the circumstances, the facts do not indicate that the statements were involuntary, but, rather, that they were the product of the appellant's exercise of free will.

Appellant challenges an instruction given by the trial judge which purported to describe conspiracy and the liability of persons in a conspiracy. This is the same instruction quoted in State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828, 846-847 (1981). There we found no reversible error in the giving of the instruction even though, as here, the appellant had never been indicted or prosecuted for conspiracy. We recognized that the instruction stated the liability imposed by Arizona's criminal responsibility statute, A.R.S. § 13-139 (now A.R.S. § 13-301 et seq.):

> "All persons concerned in the commission of a crime * * * whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission * * * are principals in any crime so committed."

Since appellant here was not convicted of conspiracy, his various arguments that the instruction did not reflect the law of the substantive crime of conspiracy or that there was insufficient evidence to warrant a conspiracy instruction are irrelevant.

Substantial evidence showed appellant's participation in the prison breakout, the robbery and kidnapping of the Lyonses and Theresa Tyson and the effort to avoid capture.

Arizona's statute A.R.S. § 13-542 provided:

> "A murder * * * which is committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in perpetration of or attempt to perpetrate * * * robbery * * * [or] kidnapping * * * is murder of the first degree."

The jury could have concluded from the evidence that the murders of the Lyons family and Theresa Tyson were committed either in avoiding lawful arrest, effecting an escape from legal custody, or in the perpetration of robbery or kidnapping. By force of A.R.S. § 13-139, appellant was therefore a principal in the homicides.

As we said in State v. Greenawalt, ____ Ariz. ____, 624 P.2d at 848:

> "While the requested instruction involving conspiracy added nothing to the State's theory of responsibility for the murders, under the felony murder statute, A.R.S. § 13-452, neither do we think it misled or confused the jury."

Appellant argues that due process requires that the conspiracy be charged in the indictment. It is true that there is a fundamental right to reasonable notice of the specific charge against an accused. Cole v. State of Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948). Appellant was informed of the crimes of which he could be convicted. There is no requirement that appellant receive notice of how his responsibility for those offenses was to be proved. See Hunter v. State of Arizona, 47 Ariz. 244, 55 P.2d 310 (1936); State v. Mendibles, 25 Ariz.App. 392, 543 P.2d 1149 (1975); People v. Pike, 22 Cal.Rptr. 664, 372 P.2d 656, 666 (1962); People v. Remiro, 89 Cal.App.3d 809, 153 Cal.Rptr. 89 (1979).

Appellant next assigns as error the felony-murder instructions given by the court. First, appellant asserts that the trial judge failed to detail the "elements" of "avoiding or preventing lawful arrest or effecting an escape from legal custody" contained in former A.R.S. § 13-452.

Appellant never requested a more detailed explanation of the terms and never objected to the instruction given. Any error in instructions not objected to is waived unless the error is fundamental. State v. Dickey, 125 Ariz. 163, 169, 608 P.2d 302 (1970); see Rule 21.3(c), Rules of Criminal Procedure, 17 A.R.S.. Where the trial court fails to instruct on a matter vital to the rights of a defendant, such an omission constitutes fundamental error. State v. Miller, 120 Ariz. 224, 585 P.2d 244 (1978); State v. Hardy, 112 Ariz. 205, 540 P.2d 677 (1975); State v. Evans, 109 Ariz. 491, 512 P.2d 1225 (1973). In State v. Smith, 114 Ariz. 415, 420, 561 P.2d 739 (1977), we held fundamental error to be "error of such dimensions that it cannot be said it is possible for a defendant to have had a fair trial."

Appellant incorrectly terms the "avoiding or preventing lawful arrest" and "escape from legal custody" contained in the first degree murder statute, former A.R.S. § 13-452, as "underlying felonies." That statute provided in its entirety:

> "A murder which is perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, deliberate or premeditated killing, or which is committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in the perpetration of, or attempt to perpetrate, arson, rape in the first degree, robbery, burglary, kidnapping, or mayhem, or sexual molestation of a child under the age of thirteen years, is murder of the first degree. All other kinds of murder are of the second degree."

In State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828 (1981), we recognized that the "arrest" and "escape" are not underlying felonies, but, rather, specified conduct. There we said:

> "* * * the State must present evidence sufficient to show that the murders were committed in 'avoiding or preventing lawful arrest or effecting an escape from legal custody,' or any of the other proscribed acts. Where the accused is charged with first degree murder, based upon the felony-murder statute, which itself requires a showing of another underlying crime or specified conduct as an element of the offense charged, evidence of the proscribed conduct cannot be precluded as being irrelevant or prejudicial." 624 P.2d at 844. (Emphasis in original.)

Put simply, no elements of the underlying crimes of "avoiding or preventing lawful arrest or effecting an escape from legal custody" were required since the terms as used in A.R.S. § 13-452 are not underlying felonies. Still the question remains whether the instruction sufficiently described the terms so as not to amount to fundamental error. People v. McGhee, 67 Mich.App. 12, 239 N.W.2d 741 (1976); see United States v. Brown, 616 F.2d 844 (5th Cir. 1980).

The underlying conduct which appellant claims was not sufficiently explained was never disputed. Appellant does not argue that the murders of the Lyons family and Theresa Tyson occurred in any manner other than in an effort to avoid arrest. Any prejudice to appellant from the court's failure to give a more particularized instruction is difficult to conceive. The conduct is, to a great extent, self-defining and a further explanation would have assisted the jury very little. It does not appear that the jury was misled. We find no fundamental error.

The appellant argues that the trial court erred in refusing to give an instruction on the termination of the underlying felonies or conduct regarding the application of the felony murder rule. He contends that the State has not shown any causal connection between the deaths and the crimes or conduct in this matter which underlie the application of the felony murder rule. We think the appellant's position ignores the undisputable facts in this case. By the

appellant's own statements, it is clear the murders occurred in the attempt to avoid lawful arrest and contemporaneously with the armed robbery and kidnapping of the Lyons family and Theresa Tyson. Thus, the murders took place during a series of events sufficiently causatively connected to the underlying crimes or conduct to support the instruction given. See State v. Gretzler, 126 Ariz. 60, 89-90, 612 P.2d 1023 (1980); State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976).

In his twelfth assignment of error, appellant urges that the trial court failed to instruct the jury on second degree murder. In State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828, 846 (1981), we held that the requested second degree murder instruction was properly refused because the evidence supported only the conclusion that the murders were committed during conduct specified in or in the perpetration of an offense enumerated in A.R.S. § 13-452. No evidence supported a second degree murder instruction. We likewise so hold here.

Appellant urges that the trial court erred in giving a flight instruction when the only evidence of flight was the appellant's capture a few hundred yards from the van in which he was riding when apprehended. It is the appellant's position that such evidence of flight manifested no consciousness of guilt on the part of appellant regarding the present charges, but bore relation only to the assaults occurring at the scene of the roadblock. We find no error in the trial court's giving of the flight instruction for the following reason. A flight instruction is permissible when evidence exists of open flight or of concealment. State v. Clark, 126 Ariz. 428, 434, 616 P.2d 888 (1980). "Evidence concerning flight is admitted because flight raises an inference which, when taken together with other evidence, points to a consciousness of

guilt on the part of a defendant." State v. Loyd, 126 Ariz. 364, 367, 616 P.2d 39, 42 (1980).

In the instant case, the record is replete with evidence of both open flight and concealment. After the homicides, appellant with his companions first stole the Lyonses' Mazda and painted it a different color. They then went to Flagstaff and changed to another vehicle, a pickup truck. Before leaving Flagstaff, they partially buried the Mazda and covered it with pine branches. Subsequently, they abandoned the pickup truck and obtained a van. When the appellant and the other members of the group were approached by law enforcement officers at the first roadblock near Casa Grande, they responded with gunfire and attempted to escape. A chase ensued with the occupants of the van shooting at the pursuing law enforcement vehicles. Appellant, his brother Raymond and Randy Greenawalt were taken into custody after being discovered hiding in the desert. It can reasonably be concluded that such conduct evidences a consciousness of guilt of prior criminal activities. Appellant's attempt to characterize their flight as only a flight from the events taking place at the roadblock does not explain their violent behavior upon confrontation by peace officers, which of itself was part of the flight.

Appellant asserts that the trial court committed error in denying appellant's request for transcripts of Randy Greenawalt's trial, which was conducted immediately prior to appellant's. Greenawalt, an accomplice of appellant, was charged with the same substantive charges made against appellant.

The United States Supreme Court in Britt v. North Carolina, 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971), held that an indigent defendant must be provided with transcripts of a prior trial that ended in a mistrial without showing a specific need. The necessity of the transcripts to an effective defense was to

be presumed. But in an analogous situation, the Court through Justice Rehnquist said:

> "* * * the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." Ross v. Moffitt, 417 U.S. 600, 616, 94 S.Ct. 2437, 2447, 41 L.Ed.2d 341 (1974).

Hence, when the indigent defendant requests a transcript of a co-defendant's trial, its necessity to an effective defense is not presumed. Rather, a defendant must show specific need. State v. Razinha, 123 Ariz. 355, 599 P.2d 808 (App. 1979). In distinguishing Britt, the court in State v. Razinha said:

> "The reason for distinguishing between the Britt situation, a prior mistrial, and a situation analogous to the one here, a trial of a co-defendant, is that the witnesses may not be common. Even if they are, their testimony as to the co-defendant may differ greatly from their proposed testimony concerning the defendant's part in the crime, depending upon the circumstances of each case." 123 Ariz. at 358.

While the witnesses were the same in Greenawalt's and appellant's trials, there must still be a showing of specific need. No such need was established. Appellant did not and does not on appeal elaborate on how the transcripts would have assisted in either trial preparation or impeaching witnesses.

More important, as stated in State v. Little, 123 Ariz. 427, 429, 600 P.2d 40 (App. 1979):

> "Britt does not stand for the proposition that an indigent defendant is absolutely entitled to a transcript of the prior proceedings under all circumstances. It is only where the transcript is available to others for a price that the principles of Britt apply. Here, the transcript was not available to anyone. We do not believe that under the circumstances the trial court was required to delay the trial some unknown time in the future in order to secure the transcript."

Randy Greenawalt's trial was completed on February 16, 1979. Appellant's trial commenced February 20, 1979 and ended February 27. It appears the transcripts of Greenawalt's trial were not prepared and available until May 4, 1979. The transcripts not being available to others, they were not required to be provided to appellant.

Appellant contends that the sentences of life imprisonment without the possibility of parole he received on the kidnapping convictions were illegal in the absence of evidence that he personally injured the victims.

A.R.S. § 13-492(C) provides:

> "1. If the person subjected to the acts mentioned in subsection A or B suffers serious bodily harm inflicted by the person found guilty, the person found guilty shall be punished by life imprisonment without possibility of parole.
>
> 2. If the person subjected to any acts mentioned in subsection A or B does not suffer serious bodily harm the person found guilty shall be punished by imprisonment in the state prison from twenty to fifty years without possibility of parole until the minimum sentence has been served." (Emphasis added.)

If subsection (1) is read literally, § 13-492(C) provides no punishment where the victim is bodily harmed but the particular defendant is not shown to have personally inflicted the harm. The State's position is that the legislative intent in the enhancement of sentence was to deter kidnappers from injuring their victims by distinguishing between injury and non-injury cases, not between injuring and non-injuring kidnappers. We agree, and hold that the sentence enhancement in A.R.S. § 13-492(C)(1) comes into play whenever a kidnapping victim is bodily harmed, even though the particular defendant convicted of kidnapping did not personally inflict the harm.

Before addressing the appellant's challenge to the determination by the sentencing judge that the sentences of death were appropriate for this defendant on these facts, the appellant has raised various issues concerning the constitutionality of our death penalty statute.

Specifically, he asserts that: (1) the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution; (2) the decision in State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), is unconstitutional because the mitigation provisions of the statute are not severable from the remainder of the statute; (3) the decision in State v. Watson, supra, is a prohibited exercise of legislative power and constitutes a judicial enactment of a bill of attainder prohibited by Article I, Section 10 of the United States Constitution; (4) the death penalty as re-created by State v. Watson, supra, will be imposed wantonly, arbitrarily and freakishly because it contains no ascertainable standards for the sentencing body to measure the relative weights of the aggravating and mitigating circumstances; and (5) the statute improperly allocates the burden of proof in requiring the defendant to prove the existence of mitigating factors and not requiring the prosecution to establish aggravating circumstances beyond a reasonable doubt. These issues have been resolved in State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828 (1981), and it is unnecessary to reconsider them at this time.

Appellant complains that the trial court erred in determining the existence of three aggravating circumstances from which it concluded to impose a death sentence. By A.R.S. § 13-454(D) and (E) (now A.R.S. § 13-703(E) and (F)), the court shall impose a sentence of death if it finds one or more of the aggravating circumstances enumerated in subsec. (E) and that there are no mitigating circumstances "sufficiently substantial to call for leniency." A.R.S. § 13-454(E) provides:

> "Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel, or depraved manner."

The appellant complains that the sentencing court found the presence of an aggravating circumstance pursuant to A.R.S. § 13-454(E)(3). He argues that the court erred in finding this because its applicability is limited to those factual situations where a grave risk of death has been created which threatens persons other than the intended victims. In essence, the appellant is urging that the simultaneous multiple murders where all the victims met their deaths cannot be construed to result in a finding of aggravation consistent with this statutory provision. We, too, have trouble rationalizing the aggravating circumstance set forth in A.R.S. § 13-454(E)(3) (now A.R.S. § 13-703(F)(3)) with the facts of this case.

The finding by the sentencing court of the existence of this aggravating circumstance does have some support in the evidence. The body of John Lyons was found near the Lincoln automobile in which the bodies of Donnelda and Christopher Lyons were found. They were close enough together to suggest that the shooting of any one of the three created a grave risk of danger to the other

two, particularly in the case of Donnelda and Christopher Lyons. But, taking all the facts into consideration, there is a suggestion that all four were ruthlessly and intentionally murdered. We think the evidence could be viewed in the light of the latter hypothesis and therefore we cannot conclude that § 13-454(E)(3) has any application to this case.

The sentencing court found the existence of the aggravating circumstances in A.R.S. § 13-454(E)(5)(now A.R.S. § 13-703(F)(5)):

> "The defendant committed the offense as consideration for the receipt, or in expectation or the receipt, of anything of pecuniary value."

Appellant's position is that in conjunction with (E)(4), the legislative intent was to apply this section only to the "hired gun" or "contract killer." However, we have previously held to the contrary in State v. Clark, supra. There, we approved the finding of an aggravating circumstance upon evidence of a robbery-murder. We found that the multiple murders in that case were committed for financial gain because the defendant had stolen money, credit cards, two diamond rings and an automobile. Id. at 436; see also State v. Madsen, 125 Ariz. 346, 609 P.2d 1046 (1980). Here, the appellant's statements along with other evidence revealed that the Lyonses' vehicle was stopped after the Lincoln became disabled. The Lyonses' automobile and various items of personal property were stolen. According to appellant's statements appearing in a psychological evaluation offered in evidence at the mitigation hearing, "the whole purpose was to obtain an automobile."

The appellant also challenges the sentencing court's finding that the offenses were committed "in an especially heinous, cruel, or depraved manner." A.R.S. § 13-454(E)(6)(now A.R.S. § 13-703 (F)(6)). He asserts that the murders were carried out by the infliction of numerous shotgun blasts causing instantaneous death to all of the victims except Theresa Tyson, and that no additional

facts exist which set this first degree murder apart from the usual one. In the special verdict, the sentencing judge said:

> "This finding is based on the evidence that the victims' vehicle was stopped, they and the vehicle were moved from the highway into the desert, and some, if not all, of the victims were placed in the Lincoln automobile where at least Donnelda Lyons and Christopher Lyons were murdered. Clearly the fatal wounds of John Lyons and Theresa Tyson were inflicted in or near the Lincoln. The conclusion is inescapable that all the victims were moved from the highway under force and, considering the arsenal possessed by the defedants [sic] and the manner in which the victims were killed, very probably at gun point. Necessarily John Lyons, Donnelda Lyons and Theresa Tyson had time to become and must have become apprehensive about their welfare and that of Christopher at first and ultimately about all their lives before the fatal shots were fired. The stress and fear each must have initially experienced had to have grown to immense, almost unimaginable proportions before they were murdered. And it is not unreasonable to conclude that one or more of the victims witnessed the murder of the others before his or her turn came, and that very likely, from where they were found, Theresa Tyson and John Lyons were those witnesses. The emotions certainly experienced by John Lyons, Donnelda Lyons and Theresa Tyson in those last minutes of their lives were the equivalent of the severest physical torture.
>
> This finding is also based on the senselessness of the murders. It was not essential to the defendants' continuing evasion of arrest that these persons be murdered. The victims could have easily been restrained sufficiently to permit the defendants to travel a long distance before the robberies, the kidnappings and the theft were reported. And in any event the killing of Christopher Lyons, who could pose no conceivable threat to the defendants, by itself compels the conclusion that it was committed in a depraved manner."

In State v. Ceja, 126 Ariz. 35, 39, 612 P.2d 491 (1980), we explained the meaning of the terms embraced by (E)(6):

> "The aspect of cruelty involves the pain and the mental and physical distress visited upon the victims. Heinous and depraved go to the mental state and attitude of the perpetrator as reflected in his words and actions."

Accord State v. Bishop, ___ Ariz. ___, 622 P.2d 478 (1980); State v. Clark, supra. For a finding of cruelty, we have required that evidence of the suffering or pain experienced by the victims be apparent. State v. Clark, supra; State v. Ceja, supra. In the

instant case, no evidence was offered to establish pain or suffering by the victims other than the medical testimony indicating that Theresa Tyson did not die instantly, but bled to death. However, the sentencing judge surmised that the victims must have experienced a great degree of mental pain by being moved from the highway at gunpoint in apprehension of the possibility of eventually being murdered and through witnessing the commission of the murders on the other family members. Such a conclusion is reasonable on these facts, but we do not rest our approval of the findings of (E)(6) alone on the existence of cruelty.

The evidence supports a finding that the murders were committed in a heinous and depraved manner. The senselessness of the murders, given the inability of the victims to thwart the escape, especially in such an isolated area, and the fact that a young child, less than two years old, who posed no threat to the captors, was indiscriminately shot while in the arms of his mother, compels the conclusion that the actual slayers possessed a shockingly evil state of mind. Less violent alternatives which would have served their purposes in preventing their detection by the authorities were obviously available. But they chose to slaughter an entire family and Theresa Tyson. The crimes were well within the plain meaning of the legislative language "especially heinous * * * or depraved * * *."

Appellant also argues that this aggravating circumstance, "especially heinous, cruel or depraved," was improperly found by the sentencing court because A.R.S. § 13-454(E)(6) contemplates active personal involvement in the homicides and the only evidence before the court indicated that the appellant did not personally participate although he was present at the scene of the shooting. We reject this notion and construe the statute to mean that a defendant who is actually present at the homicide, having actively

participated in all the events leading thereto, will not be heard to deny that he was not causally connected with the crime at the highest level and in the fullest sense. But for the appellant's assistance from the moment he and his brothers furnished guns to Gary Tison and Greenawalt, the victims would not have died.

Further, we believe that the lower court mistakenly concluded that A.R.S. § 13-454(E)(1) and (2) should not apply.

Appellant was convicted of seventeen counts of assault with a deadly weapon for his participation in the events taking place at the prison and at his capture in Pinal County. As a result of these convictions, appellant received concurrent sentences on each count of 30 years to life. See State v. Greenawalt, et al, ____ Ariz. ____, 626 P.2d 118 (1981). The trial court's belief that the charges could have been brought in a single information or indictment along with the charges in this case unduly limits the statutory reach of the legislative act. The criminal offenses which occurred in Pinal County constitute separate offenses. They arose out of different incidents which had taken place at the prison and at the roadblock. These convictions were punishable by life imprisonment and, therefore, should have been considered aggravating circumstances under (E)(1).

The convictions were also an aggravating circumstance under (E)(2): appellant "was previously convicted of a felony in the United States involving the use or threat of violence on another person." The felony convictions of assault with a deadly weapon necessarily involved the type of violent behavior against which this aggravating circumstance is directed. That some of the offenses occurred subsequent in time to the offenses which are now upon review does not alter our conclusion. The consideration of these convictions as aggravating circumstances regardless of

the time of their occurrence serves the legitimate purpose of the statute to evaluate the character and propensities of the appellant. State v. Steelman, 126 Ariz. 19, 612 P.2d 475 (1980); State v. Valencia, 124 Ariz. 139, 602 P.2d 807 (1979). See also State v. Superior Ct. of State of Ariz., Etc., ___ Ariz. ___, 627 P.2d 1081 (1981).

We do not, however, base our decision on subsections (E)(1) and (2), being satisfied that subsections (E)(5) and (6) fully support the death sentences.

Appellant argues that in addition to the mitigating circumstances found by the trial judge (age, minimal prior criminal activity and convictions based on the felony murder rule), other mitigating circumstances exist. Appellant claims the psychological reports on his mother and himself establish the strong, manipulative influence his father, Gary Tison, had on him. We, however, conclude the report does not support this argument. While Dr. MacDonald, the psychologist, believed Gary Tison applied subtle and continual influence on appellant, he concluded appellant suffered from no thought disorders and:

> "became involved in these events on his own volition, planning it carefully, not under the influence of drugs or alcohol, not under any threat or undue persuasion and certainly not while in a state of psychosis or high mental disturbance." (Emphasis added.)

The facts also do not support appellant's contention. There was substantial evidence that appellant along with his brothers planned the escape from the beginning and that he continued with his father and Greenawalt both before and after the murder , even though there were obvious opportunities to dissociate himself from them.

Appellant also argues as mitigating circumstances that numerous persons wrote letters on his behalf, pointing out his prior non-violent character, and the fact that he did not actually commit the murders. However, we are not impressed. The evidence from beginning to end establishes the ruthless character of the participants in the offenses. Appellant planned the escape for months with his brothers. During that time they gathered together an arsenal of lethal weapons which were used against others during the prison breakout. Later the same weapons were used by appellant and his companions to kidnap, rob, and finally murder the Lyons party. Appellant obviously possessed the capacity to engage in violent behavior when it suited his preference.

It is argued that appellant's participation in the murders was relatively minor and that he should not be sentenced to death since he did not specifically intend the victims' deaths. The trial court, however, found as to both Ricky and Raymond Tison:

> "Neither defendant's participation was relatively minor. Although each of the defendants has stated the murders were actually committed by Gary Tison and Randy Greenawalt, the participation of each in the crimes giving rise to the application of the felony murder rule in this case was very substantial. Even accepting as true their statements of who actually fired the fatal shots, it cannot be said that their participation was relatively minor. By their own statements their participation up to the moment of the firing of the fatal shots was substantially the same as that of Randy Greenawalt and Gary Tison. At the moment of the firing their participation may not have equalled that of Randy Greenawalt and Gary Tison, but their standing and watching then [sic] while armed themselves cannot be characterized as relatively minor participation."

The record establishes that both Ricky and Raymond Tison were present when the homicides took place and that they occurred as part of and in the course of the escape and continuous attempt to prevent recapture. The deaths would not have occurred but for their assistance. That they did not specifically intend that the Lyonses and Theresa Tyson die, that they did not plot in advance

that these homicides would take place, or that they did not actually pull the triggers on the guns which inflicted the fatal wounds is of little significance. Ricky and Raymond Tison associated themselves with others who were willing to and had in the past committed savage, homicidal acts. They were palpably indifferent to the consequences of their lawless conduct. They will not be relieved of the punishment the law exacts where the criminal association was formed, supported and carried out irrespective of the probable consequences that human life would be taken to ensure the success of the criminal enterprise. We assent to the retributive principle of justice which demands that persons be punished in proportion to their personal involvement in the crime, focusing the inquiry on the harm which may fairly be attributed to a participant's conduct. See U.S. Const. amend. VIII. This is not a case of minimal assistance. Compare Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

If a crime is caused to occur by an accessory but the accessory is not the actual perpetrator, this fact will not alone constitutionally prevent punishment of the accessory to the same extent as the perpetrator since both have caused the death to occur. See Dressler, The Jurisprudence of Death by Another: Accessories and Capital Punishment, 51 U.Colo.L.Rev. 17, 54 (1979). The extent of the accessory's participation was substantial. As a minimum, the Tison brothers stood by, armed with guns, while their companions slaughtered the Lyonses and Theresa Tyson. The

mitigating circumstances are not "sufficiently substantial to call for leniency."

Judgments of conviction and sentences affirmed.

FRED C. STRUCKMEYER, JR.
Chief Justice

CONCURRING:

WILLIAM A. HOLOHAN, Vice Chief Justice

JACK D. H. HAYS, Justice

JAMES DUKE CAMERON, Justice

GORDON, Justice (Specially Concurring):

Although I would affirm all the judgments and sentences in this case, I still feel as I did in State v. Clark, 126 Ariz. 428, 616 P.2d 888 (1980) that when A.R.S. § 13-454(E) (4) and (5) are read together it is clear that the Legislature intended those sections to apply only to situations involving a homicide committed by a hired killer. I do not believe that they were intended to be applied to homicides occurring in the course of robberies. To that extent I would disagree with the majority.

FRANK X. GORDON, JR.
Justice

Exhibit B

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Banc

FILED
JUL 9 1981
S. ALAN COOK
CLERK SUPREME COURT
BY

STATE OF ARIZONA,
Appellee,
v.
RAYMOND CURTIS TISON,
Appellant.

No. 4624

Appeal from the Superior Court of Yuma County
Cause No. 9299
Honorable Douglas W. Keddie, Judge

AFFIRMED

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The American Baptist Churches in the U.S.A.

STRUCKMEYER, Chief Justice

This is an appeal by Raymond Curtis Tison from judgments of guilty to four counts of murder in the first degree and sentences of death thereon, two counts of armed robbery, three counts of kidnapping, and one count of theft of a motor vehicle. It is a companion case to that of Ricky Wayne Tison, No. 4612, decided this date. Judgments and sentences affirmed.

On July 30, 1978, appellant and his two brothers, Ricky and Donald Tison, visited the Arizona State Prison at Florence, Arizona. Appellant went to the north annex, ostensibly to see his father, Gary Tison, who was serving a life sentence for murder. Gary Tison's cellmate, Randy Greenawalt, another convicted murderer, was close by in the control room. Appellant's two brothers, Ricky and Donald Tison, while in the yard office of the annex, took out guns which had been concealed in an ice chest. Greenawalt was given a gun and he passed it to Gary Tison. The guards who were present and some prison visitors were locked in a storage closet. The Tisons, with Greenawalt, then left the prison in an escape.

On August 6, 1978, an abandoned Lincoln Continental was found near Quartzsite, Arizona. The body of John Lyons was found near the vehicle and the bodies of Donnelda Lyons, his wife, and their twenty-two-month-old son, Christopher, were found inside the car. Another body, that of Theresa Tyson, the Lyonses' niece, was found one-fifth of a mile west of the vehicle. It was established that the Lyonses had left their home in Yuma, traveling toward Las Vegas, Nevada, in a late model Mazda on the evening of July 31, 1978. This vehicle was eventually found partially buried and covered with pine tree branches near Flagstaff, Arizona.

In the early morning hours of August 11, 1978, appellant, together with Ricky Tison and Randy Greenawalt, was captured near Casa Grande, Arizona after a high speed chase. They attempted to

run a roadblock in a stolen Ford van. All were armed with weapons. During the capture, Donald Tison, the driver of the van, was shot in the head. Gary Tison fled into the desert and was found dead a few days later.

Appellant was tried along with Greenawalt and Ricky Tison in Pinal County, Arizona for crimes occurring at the prison and at the roadblock. Appellant was convicted of seventeen counts of assault with a deadly weapon, possession of a stolen motor vehicle, unlawful flight from a pursuing law enforcement vehicle, and aiding and assisting an escape. These convictions were affirmed by this Court in State v. Greenawalt, et al. on the 24th day of February, 1981, ____ Ariz. ____, 626 P.2d 118 (1981).

The convictions being upheld here resulted from a trial in Yuma County, conducted immediately following the trials first of Greenawalt and then of Ricky Wayne Tison. Greenawalt's convictions for murder, armed robbery, kidnapping and theft of a motor vehicle and sentences were affirmed by this Court in State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828 (1981). Ricky Wayne Tison's appeals from convictions for similar offenses were resolved this day in Cause No. 4612.

Appellant has presented twenty-two assignments of error, most of which do not differ from those asserted and resolved in the companion case of State v. Ricky Wayne Tison, ____ Ariz. ____, ____ P.2d ____(1981)(No. 4612, filed this date). The similarity of the issues in the two cases was recognized by counsel for Raymond Curtis Tison in his motion to consolidate oral arguments:

> "The two cases have a number of issues in common, including all of the conspiracy issues, felony-murder issues, vicarious liability questions, and death penalty issues, over which separate oral argument would be redundant."

We therefore find it unnecessary to reconsider the following issues which were discussed and resolved in State v. Ricky Wayne Tison, Cause 4612, supra: (1) that the plea agreement should be specifically enforced against the State, since it improperly compelled the appellant to withdraw from the agreement; (2) that an expert should have been appointed to conduct a public opinion survey; (3) that the trial court erred in giving the conspiracy instructions when the prosecution relied on the theory of aiding and abetting to impose criminal liability; (4) that the trial court erred in the conspiracy instructions given because Arizona law does not recognize vicarious liability for the acts of a co-conspirator; (5) that it was fundamental error for the trial court to fail to instruct the jury on the elements of the crime of conspiracy; (6) that the trial court erred by failing to instruct on the elements of escape from legal custody and avoidance or prevention of lawful arrest contained in the felony murder statute; (7) that the trial court erred in failing to instruct on termination of a felony underlying application of the felony murder rule; (8) that the trial court erred in failing to provide transcripts of co-defendant Randy Greenawalt's trial, see State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828 (1981); (9) that the sentencing judge erred in his interpretation of the aggravating circumstances contained in A.R.S. § 13-454(E) (now § 13-703(F)); (10) that the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution; (11) that the decision in State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied 440 U.S. 924 (1979), is unconstitutional because the mitigating portions of the statute are not severable from the remainder of the statute; (12) that State v. Watson, supra, constitutes a prohibited exercise of legislative power in violation

of Article III of the Constitution of Arizona; (13) that State v. Watson, supra, constitutes a judicial enactment of a bill of attainder prohibited by Article I, Section 10 of the United States Constitution; (14) that the death penalty as re-created by State v. Watson, supra, will be imposed wantonly, arbitrarily and freakishly because it contains no ascertainable standards for the sentencing body to measure the relative weights of the aggravating and mitigating circumstances; (15) that the death penalty statute improperly allocates the burden of proof in requiring the defendant to prove the existence of mitigating factors and not requiring the prosecution to establish aggravating circumstances beyond a reasonable doubt; and (16) that the imposition of the sentence of death upon an individual convicted under a felony murder theory without evidence that he was the actual perpetrator of the homicide or intended that the victim should die is grossly disproportionate and violates the prohibition against cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution.

Our resolution here of the above enumerated issues is identical to their resolution in State v. Ricky Wayne Tison, supra.

In addition, appellant urges that as a result of the pretrial publicity, the trial court erred in denying his motions for change of venue, change of venire, continuance, sequestration of the jury and for individual voir dire. We will examine these assertions in the light of the established law that the determinations rest within the sound discretion of the trial court and will not be disturbed on appeal lacking a clear showing of abuse of discretion and resulting prejudice. State v. Ricky Wayne Tison, supra; State v. Greenawalt, et al, ____ Ariz. ____, 626 P.2d 118 (1981); State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828 (1981).

It is appellant's position that pretrial publicity had so "permeated the commun cy" and was so prejudicial that a change of venue was necessitated. He points to the fact that every member of the jury panel had some knowledge of the case.

In State v. Schmid, 107 Ariz. 191, 484 P.2d 187 (1971), this Court recognized that prior knowledge concerning a case by all of the empaneled jurors was an important factor for the trial judge to consider in ruling on the motion for change of venue, but that standing alone it did not demonstrate such prejudice as would necessitate a change of venue. The grounds for change of venue require the movant to show that pretrial publicity has the probable effect of precluding a trial by fair and impartial jurors. State v. Ricky Wayne Tison, supra; State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828 (1981). Nothing approaching such a showing was made by appellant. Of the 50 prospective jurors that needed to be called to obtain a panel of 34, 16 expressed an unqualified opinion as to the guilt of the accused. These prospective jurors were excused and the remaining members of the panel, even though possessing some knowledge of the case, stated that they could try the case on the evidence presented in court. It is unnecessary for a juror to be totally ignorant of the facts of a case so long as he can lay aside his impressions or opinions and render a verdict based on the evidence before him. State v. Smith, 123 Ariz. 231, 599 P.2d 187 (1979). While the assurances of impartiality by the jurors are not dispositive on the question of actual prejudice toward the defendant, in the absence of any showing of the probability of an unfair trial we will not upset the trial judge's ruling on the motion for change of venue. Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). See State v. Greenawalt, et al., 626 P.2d 118, 122 (1981).

The appellant asserts that error was committed because the jury was not sequestered. He believes this procedure should have been adopted in order to prevent the jury from being exposed to the "massive publicity surrounding the trial." We do not agree. The record does not reflect the presence of such publicity, nor does it show jury misconduct or that the jury failed to follow the admonitions given by the trial judge.

Appellant claims the trial court erred in failing to conduct individual voir dire. The primary responsibility for the voir dire examination rests with the trial judge. See State v. Ricky Wayne Tison, supra, but if good cause appears, the court may permit counsel to examine an individual juror. Rule 18.5, Rules of Criminal Procedure, 17 A.R.S. This opportunity to ask questions of individual jurors was afforded counsel for appellant and he declined to do so. We will not disturb the trial court's selection of the jury in the absence of a showing that a jury of fair and impartial jurors was not chosen.

Appellant urges that he was denied a fair trial guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution and characterized the pretrial publicity as "unchecked and irresponsible journalism" which created a carnival-like atmosphere similar to the one condemned in Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). He then points to specific items of media coverage which he believes reflect the extreme prejudicial conditions under which this trial was conducted. He complains of the press coverage concerning his involvement in the prison breakout of Gary Tison and Randy Greenawalt, his initial agreement to plead guilty and receive a life sentence in exchange for his testimony against co-defendant Greenawalt, his alleged confession, the

physical evidence connecting appellant to the deaths of the Lyons family and Theresa Tyson, the listing of the names of witnesses in the Greenawalt trial who would most probably testify at appellant's trial, and the opinions of appellant's guilt in editorials and letters to the editor in various newspapers.

In State v. Schmid, 109 Ariz. 349, 509 P.2d 619 (1973), supra, we recognized that certain publicity similar to that described above could create prejudice to the extent of precluding the possibility of a fair trial. But to presume prejudice, outrageous circumstances must be present showing the lack of solemnity and sobriety appropriate to a judicial proceeding. State v. Greenawalt, ____ Ariz. ____, 624 P.2d 828 (1981). Upon reviewing the record, we find nothing resembling such extreme circumstances. See Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975).

We now turn to an examination of the actual publicity in the case to ascertain, first, if it reached prospective jurors and, second, if it was so prejudicial that the jurors could not have set it aside. State v. Greenawalt, et al, ____ Ariz. ____, 626 P.2d 118 (1981). A review of the nature of the publicity and the relative difficulty in selecting the jury can indicate the presence of actual prejudice. Id. It cannot be disputed that appellant's activities, together with the other Tisons', received massive publicity from the break out of the state prison until their capture near Casa Grande, some twelve days later. Thereafter, the Tisons and Greenawalt received less attention in the press. The only inflammatory articles which could possibly be considered prejudicial were two appearing in the Arizona Republic, a newspaper published in Phoenix, Arizona, nearly 200 miles from Yuma, the site of the trial.

On Wednesday, August 8, 1978, an editorial appeared in the Arizona Republic, entitled "Society Has Had It!" The tenor of the editorial is set in the first five sentences, which read:

> "BLEEDING-HEART critics of the death penalty peg their case on the vacuous assertion that capital punishemnt is no deterrent to heinous crimes.
>
> Let them come down from their lofty perches and tell that to the survivors of Marine Corps Sgt. John H. Lyons, 24, his wife, Danellda [sic], 23, and their son Christopher, 22 months.
>
> They were found beside a highway near Quartzsite, riddled with pellets from repeated shotgun blasts.
>
> Police are almost certain they were gunned down by two escaped Arizona prison inmates, Gary Tison, 43, and Randy Greenawalt, 28.
>
> Now how does death penalty deterrence figure in this crime?"

On Wednesday, August 16, 1978, a column by Paul Dean of the Arizona Republic commenced in this fashion:

> "The voice of the people is a towering yell.
>
> More than 300 letters and telephone calls to me and to the editors of this newspaper have formed an angry appeal for protection from Greenawalt and the Tisons and the bestiality they are charged with performing, may be continuing and could inspire others."

It was established that some of the prospective jurors read the Arizona Republic. These newspaper articles, however, appeared approximately six months prior to the date of trial. The ease with which a jury was selected strongly tends to suggest that publicity-caused prejudice did not extensively pervade the community nor influence jurors to the point of prejudicing appellant. While 16 of the 50 prospective jurors acknowledged that they were prejudiced against appellant, many were unaware of statements attributed to the appellant which had the greatest potential for the creation of jury prejudice. The circumstances

were such that we do not find actual prejudice permeated the jury panel to the extent that appellant was deprived of a fair trial.

For similar reasons the court did not err in denying appellant's motions for change in the venire and for a continuance of the trial.

The appellant argues that the evidence presented by the State was not sufficient to support convictions for armed robbery, kidnapping and theft of a motor vehicle.

On appeal, this Court will not engage in re-weighing the evidence. State v. Brown, 125 Ariz. 160, 608 P.2d 299 (1980); State v. Long, 121 Ariz. 280, 589 P.2d 1312 (1979); State v. Acree, 121 Ariz. 94, 588 P.2d 836 (1978). It will be viewed in the light most favorable to sustaining the conviction and all reasonable inferences will be resolved against a defendant. State v. Verdugo, 109 Ariz. 391, 510 P.2d 37 (1973). The test to be applied is whether there is substantial evidence to support a guilty verdict. State v. Childs, 113 Ariz. 318, 553 P.2d 1192 (1976). In the recent case of Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), it was held that due process requires a court to utilize as the standard of review whether there was sufficient evidence that a rational trier of fact could have found guilt beyond a reasonable doubt. The Court said:

> "After Winship the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' Woodby v. INS, 385 U.S. 276, 282, 87 S.Ct. 483, 486, 17 L.Ed.2d 362. Instead the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Johnson v. Louisiana, 406 U.S. 356, 362, 92 S.Ct. 1620, 32 L.Ed.2d 152. This familiar standard

> gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the fact-finder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." 443 U.S. ____, 99 S.Ct. at 2789-2790. (Footnotes omitted.) (Emphasis in original.)

In Arizona, the substantial evidence test applied to reviews on appeal is consistent with the constitutional principles enunciated in Jackson v. Virginia, supra. The manner in which we have defined the term "substantial evidence" supports this conclusion. We have said it means "* * * more than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial." State v. Bearden, 99 Ariz. 1, 4, 405 P.2d 885 (1965). (Citations omitted.) This approach equates with the mandate in Jackson requiring the reviewing court to find that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. See State v. Robinson, 288 N.W.2d 337 (Iowa 1980). See also Davis v. United States, 385 F.2d 919 (5th Cir. 1967). Other jurisdictions with a standard of review similar to our own have reached the same conclusion. See People v. Johnson, 26 Cal.3d 557, 606 P.2d 738, 162 Cal.Rptr 431 (1980); State v. Lagasse, 410 A.2d 537 (Me. 1980); Wilkins v. State, 609 P.2d 309 (Nev. 1980); Hauger v. State, 405 N.E.2d 526 (Ind. 1980); State v. Robinson, supra; People v. Calvaresi, 600 P.2d 57 (Colo. 1979); State v. Brown, 80 N.J. 587, 404 A.2d 1111 (1979); State v. Atkins, 261 S.E.2d 55 (W.Va. 1979), cert. denied 100 S.Ct. 1081 (1980). Those jurisdictions which have not specifically examined their

standard in the light of the holding in Jackson have embraced it as a new standard for reviewing the sufficiency of evidence. See State v. Filson, 101 Idaho 381, 613 P.2d 938 (1980); People v. McDonald, 409 Mich. 110, 293 N.W.2d 588 (1980); State v. Letterman, 603 S.W.2d 951 (Mo.App. 1980); State v. Hardy, 419 A.2d 398 (N.H. 1980); State v. Harris, 288 Ore. 703, 609 P.2d 798 (1980); Young v. State, 407 A.2d 517 (Del. 1979); Moore v. State, 151 Ga.App. 120, 258 S.E.2d 917 (1979); State v. Voiles, 226 Kan. 469, 601 P.2d 1121 (1979); State v. Abercrombie, 375 So.2d 1170 (La. 1979); State v. Rusk, 289 Md. 230, 424 A.2d 720 (1981); State v. Barbour, 43 N.C.App. 143, 258 S.E.2d 475 (1979); Holt v. State, 591 S.W.785 (Tenn. 1979). Our review function will therefore be concerned with whether there exists substantial evidence from the entire record from which a rational trier of fact could have found guilt beyond a reasonable doubt.

Appellant was held responsible for these crimes through the application of A.R.S. § 13-139 (now A.R.S. § 13-301). Liability as a principal is predicated upon proof that a defendant was concerned in the commission of a crime whether directly committing the crime or aiding and abetting its commission. Aiding and abetting presupposes active participation in the offense or advice or encouragement in the commission and a corresponding intent to facilitate the perpetration. State v. Bearden, supra.

The evidence introduced by the prosecution clearly supports the appellant's convictions for armed robbery, kidnapping and theft of a motor vehicle under the aiding and abetting theory of criminal responsibility. While there was no direct testimony that appellant actively participated in the commission of these crimes, there was ample circumstantial evidence from which the jury could have reasonably inferred that the appellant had assisted in their commission.

Appellant's fingerprint was found on the door release button of the Lincoln Continental, where two of the victims' bodies were found, thereby strongly suggesting that he was present at the scene of the homicides. Although a defendant's presence at the time and place of the crime in the absence of preconcert does not establish guilt as an aider, abettor or principal, State v. Hernandez, 112 Ariz. 246, 540 P.2d 1227 (1975); State v. Sims, 99 Ariz. 302, 409 P.2d 17 (1965), cert. denied 384 U.S. 980 (1966), an intent to engage in the criminal venture may be shown by the relationship of the parties and their conduct before and after the offense. State v. Beard, 107 Ariz. 388, 489 P.2d 25 (1971); State v. Villegas, 101 Ariz. 465, 420 P.2d 940 (1966); State v. Parker, 121 Ariz. 172, 589 P.2d 46 (App. 1978).

It is clear that appellant and his brothers were intimately engaged in a scheme designed to free their father from imprisonment. It can be reasonable to infer that their goal did not change from the time of the initial active assistance in breaking out of the prison through their capture eleven days later. The uncontradicted evidence established that appellant, along with his brother Ricky, made the arrangements with their uncle, Joe Tison, to obtain the automobile and various weapons which were used in the prison breakout. Appellant actively participated in the escape by bringing weapons into the trustee control annex, by holding prison guards and others at gunpoint, and fleeing in the company of his father, his brothers and Greenawalt.

The testiomony of a Wenden, Arizona store clerk established that appellant was in Yuma County on August 1, 1978, at a time shortly after the homicides were committed. He and his brothers purchased silver spray paint which was used to disguise the Lyonses' stolen Mazda near Flagstaff. On August 2, 1978, appellant

was seen in Flagstaff near the location of the partially buried, stolen Mazda. Finally, on August 11, 1978, appellant, together with Greenawalt and Ricky Tison, were captured after a high speed chase near Casa Grande. In the light of this evidence, it is reasonable for the jury to have inferred that appellant was not only present at the scene of the crimes, but willingly participated in the doing of whatever was necessary to complete the escape and to prevent capture. Appellant had eleven days after the breakout to disassociate himself from further participation in the criminal venture, but he did not. The jury could have readily concluded beyond a reasonable doubt that appellant was more than an abettor but was, rather, a direct participant in commission of the robbery, kidnapping and theft.

Finally, evidence of the appellant's flight supports an inference that the appellant was guilty of the offenses. He did not simply leave the scene of the crimes, for this, alone, would not support an inference of guilt. See State v. Ceja, 113 Ariz. 39, 546 P.2d 6 (1976), appeal after remand 115 Ariz. 413, 565 P.2d 1274, cert. denied 434 U.S. 975 (1977). Rather, appellant and his companions repeatedly changed motor vehicles and sought to conceal the change by abandoning the Lincoln some distance off the highway, camouflaging the Mazda with paint and pine branches, and by abandoning at a Chevrolet dealership in Colorado the four-wheel-drive pickup obtained in Flagstaff. At the roadblock in Pinal County, Arizona, appellant, to avoid being apprehended, ran into the desert with Greenawalt and his brother Ricky. Flight to avoid capture is circumstantial evidence of the guilt of an accused. State v. Sorensen, 104 Ariz. 503, 455 P.2d 981 (1969).

The circumstantial evidence when examined as a whole did provide the jury with sufficient evidence from which it could have

found appellant guilty beyond a reasonable doubt of armed robbery, kidnapping and theft. The lack of direct evidence of guilt does not preclude such a conclusion since a criminal conviction may rest solely upon proof of a circumstantial nature, State v. Carriger, 123 Ariz. 335, 599 P.2d 788 (1979), cert. denied 444 U.S. 1049 (1980). It is unnecessary for the prosectuion to negate every conceivable hypothesis of innocence when guilt has been established by circumstantial evidence. State v. Olivas, 119 Ariz. 22, 579 P.2d 60 (App. 1978).

The evidence at Raymond's trial relating to the location of the bodies and wounds was similar to that introduced at Ricky's trial. For the reasons set forth in State v. Ricky Wayne Tison (No. 4612), supra, we are not convinced "a grave risk of death" was created to others, and hold here, as we did there, that the aggravating circumstance to be found in A.R.S. § 13-454(E)(3) does not apply.

The aggravating circumstance to be found in A.R.S. § 13-454 (E)(5) is, however, clearly established. The bodies of the victims were in and around the Lincoln Continental which had been used by appellant and his companions in the escape. After its abandonment, they left the scene of the homicides in the Lyonses automobile. Considering all the facts, the conclusion is justified that the homicides were committed to secure a vehicle with which to continue their flight.

We agree with the trial judge's finding that the murders were "committed * * * in an especially heinous * * * or depraved manner", A.R.S. § 13-454(E)(6). One of the victims was a twenty-two-month-old child held in the arms of his mother. We reject the appellant's argument that this aggravating circumstance can be found only if he actually committed the murders. Appellant is in effect saying

that since he did not personally pull the trigger of the guns used to commit the homicides, he cannot be held responsible for committing the offenses in an especially heinous, depraved manner.

As in the case of Ricky Tison, the trial judge found in mitigation of the offenses appellant's age, his minimal prior criminal activity, and that his convictions were based on the felony murder rule, former A.R.S. § 13-452. Appellant argues mitigation also exists in that he was strongly manipulated by his father, Gary Tison, pointing to the psychological reports on his mother and himself.

The psychologist did find a "very subtle sense of emotional manipulation on the part of" appellant's father, Gary Tison, which may have contributed in part to appellant's "amoral and somewhat antisocial development * * *." The psychologist concluded appellant "was not, in my opinion, operating under any irresistible impulse or irrestible urge" and did not conclude that appellant was under undue influence or duress.

Because the law is egalitarian, all persons are held accountable for the results of their conduct, it being presumed that all possess a free will. See Dressler, The Jurisprudence of Death by Another: Accessories and Capital Punishment, 51 U.Col.L.Rev. 17 (1979). Even though Gary Tison had significant influence with appellant, the evidence does not support the notion that appellant's will was overwhelmed or that appellant was anything other than a willing participant in the escape and the subsequent events. The sentencing judge did not find Gary Tison's influence or "subtle * * * manipulation" to be "sufficiently substantial to call for leniency." Nor do we.

Neither do we find the letters written on behalf of appellant, to the effect that he was essentially a peaceful person, of much

value in light of the evidence that appellant exhibited his willingness to use force and violence at the time of the prison breakout and on subsequent occasions by violent criminal conduct. Even the psychological report offered in mitigation revealed appellant's potential for violence:

> "Raymond * * * felt almost certainly that if they became involved with legal authorities or were near capture that a shooting incident would occur. He stated that in terms of innocent civilians being injured that it was most unfortunate but that his father was in charge. His father was running it like 'a military operation and there were no survivors -- you know, that sort of thing -- no witnesses.'"

Appellant points to his limited participation in the murders. To prove his limited participation, he joined with Ricky Tison in arguing that Ricky's statement showed that neither he nor Ricky engaged in the actual shooting nor did they intend the deaths of the victims. In upholding the sentence and conviction of Ricky Tison, we said as to both brothers that the non-participation in the shooting was not controlling since both took part in the robbery, the kidnapping, and were present assisting in the detention of the Lyonses and Theresa Tyson while the homicides were committed.

The mitigating circumstances when considered separately and collectively are not sufficiently substantial to call for leniency.

Appellant complains that he did not receive a fair trial because he was denied effective assistance of counsel. Since State v. Kruchten, 101 Ariz. 186, 417 P.2d 510 (1966), cert. denied 385 U.S. 1043 (1967), the standard in Arizona has been whether counsel was so ineffective that the proceedings were reduced to a farce, sham or mockery of justice. Recently, in State v. Williams, 122 Ariz. 146, 593 P.2d 896, we recognized that many jurisdictions have discarded the farce, sham or mockery of justice

test and have adopted the reasonably effective assistance of counsel standard. We have not adopted the reasonably effective assistance of counsel as the test. Nevertheless, after examining the record, we find no indication that trial counsel's efforts were inadequate judged by either standard. See State v. Moreno, ___ Ariz. ___, 625 P.2d 320 (1981); State v. Flewellen, ___ Ariz. ___, 621 P.2d 29 (1980).

The burden of establishing the ineffectiveness of trial counsel is upon a claimant, State v. Pacheco, 121 Ariz. 88, 588 P.2d 830 (1978); see State v. Watson, 114 Ariz. 1, 559 P.2d 121 (1976), and proof of ineffectiveness must be a demonstrable reality not merely a matter of speculation. See State v. Daniel, 25 Ariz.App. 592, 545 P.2d 440 (1976); People v. Stephenson, 10 Cal.3d 652, 517 P.2d 820, 111 Cal.Rptr. 556 (1974). Moreover, errors in trial tactics or strategy per se do not constitute inadequate representation. State v. Flewellen, supra; State v. Dippre, 121 Ariz. 596, 592 P.2d 1252 (1979); State v. Farni, 112 Ariz. 132, 539 P.2d 889 (1975).

Appellant asserts that his trial counsel inadequately cross-examined the witnesses for the State. But, as the State points out, counsel for appellant did engage in cross-examination of several witnesses, exposing inconsistencies in their testimony. In hindsight, we see no indication that the questioning of the State's witnesses was inadequate. But were it otherwise, the manner in which cross-examination is conducted is a tactical decision to be made by the lawyer. See Standard 4-5.2, A.B.A. Standards for Criminal Justice. The method utilized is not indicative of inadequate representation. See State v. Farni, supra.

Appellant claims that counsel's "failure to fully argue his case to the jury at the conclusion of the trial" shows ineffective

representation. Counsel did argue that guilt had not been proven beyond a reasonable doubt in the light of the failure of the State to prove the extent of appellant's participation in the homicides. The failure to engage in a lengthy closing argument does not necessarily show incompetence, since silence by trial counsel may be the most effective trial tactic. See State v. Martinez, 19 Ariz.App. 417, 508 P.2d 82, cert. denied 414 U.S. 1027 (1973).

Appellant asserts that it was error for counsel to fail to individually examine prospective jurors. Appellant's argument overlooks the fact that the questioning carried out by the trial judge could have been adequate in counsel's judgment. Moreover, the decision to ask additional questions may be in part predicated on strategy and, hence, one which rests peculiarly within the province of counsel. The failure to ask unnecessary questions is not indicative of ineffective representation. See Gustave v. United States, 627 F.2d 901 (9th Cir. 1980).

Finally, the appellant asserts that he received only a minimal defense. He does not point out, however, what more could have been done which would support his claim. Considering the record of appellant's trial as a whole and the prosecution's evidence, we do not believe that counsel was ineffective as an attorney or that he presented a lackluster defense. If the assertion of ineffective assistance of counsel on the grounds of a minimal effort is made, the record should establish where

further effort would have been to a defendant's advantage. See State v. Rackley, 106 Ariz. 424, 477 P.2d 255 (1970).

Judgments and sentences affirmed.

FRED C. STRUCKMEYER, JR.
Chief Justice

CONCURRING:

WILLIAM A. HOLOHAN, Vice Chief Justice

JACK D. H. HAYS, Justice

JAMES DUKE CAMERON, Justice

FRANK X. GORDON, JR., Justice

Exhibit C

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YUMA

STATE OF ARIZONA, Plaintiff, vs. RICKY WAYNE TISON and RAYMOND CURTIS TISON, Defendants.	NO. 9299

Yuma, Arizona

BEFORE: THE HONORABLE DOUGLAS W. KEDDIE
Judge of the Superior Court
Division Three, Yuma, Arizona.

AGGRAVATION HEARING
AND
SENTENCING

SUPERIOR COURT
YUMA, ARIZONA

March 29, 1979
9:00 a.m.

SENTENCING

APPEARANCES: MICHAEL IRWIN, Yuma County Attorney, For the State.

MICHAEL BEERS, Attorney at Law, Casa Grande, Arizona, For Defendant Ricky Tison.

HARRY BAGNALL, Attorney at Law, Coolidge, Arizona, For Defendant Raymond Tison.

THE COURT: Number 9299, the State of Arizona versus Ricky Wayne Tison and Raymond Curtis Tison. This matter comes on for pronouncement of judgment and sentence at this time. Before doing so it is necessary that I render a special verdict regarding aggravating and mitigating circumstances. Does the State have anything to add?

MR. IRWIN: Your Honor, the arguments and the position of the State as to the law that applies in this matter has been set forth in the memorandum which has previously been submitted to the Court. We have nothing to add to that at this time.

THE COURT: Mr. Beers, on behalf of the defendant Ricky Tison do you have anything to add?

MR. BEERS: Regarding the aggravating and mitigating circumstances my position is clearly laid out from the memorandum. I have nothing to add to that.

THE COURT: Mr. Bagnall.

MR. BAGNALL: Since I adopted in principle all of the matters contained in the memorandum of Mr. Beers I merely concur in that and call the Court's attention to the memorandum which I submitted on the one question.

THE COURT: Yes, they have been fully considered. Did you want to make that other exhibit a part of the record?

MR. BEERS: Yes, Your Honor, I would. There is a copy of the presentence report prepared by Carl Cansler and I would like it marked.

THE COURT: And you wish it noted that specifically you object to those portions you have underlined in red?

MR. BEERS: Yes, Your Honor. I object to them and I think they are misinterpretation of the facts and I think it could have been cleared up had Mr. Cansler spoken directly to Ricky. He was advised that Ricky was willing to speak to him on March 15.

THE COURT: All right. Let the record note that the matters referred to are conclusions and simply interpretations made by the probation officer.

MR. BAGNALL: I would say one thing further, Your Honor, with respect to the report by the probation officer that reading into it it seems protagonistic towards the position taken by the county attorney.

THE COURT: All right. Pursuant to A.R.S. Section 13-454 C in which the Court returns a special verdict of its findings of the existence or nonexistence of aggravating circumstances as set forth in 13-454 E and of any mitigating circumstances.

Respecting aggravating circumstances. The only information relevant to any of the aggravating circumstances set forth in section 13-454 E which has been considered by this Court in making these findings concerning aggravating circumstances as to each defendant is that received in evidnce at his trial on the murder charges and that received in evidence on these charges at the sentencing hearing conducted March 14, 1979. And specifically in that regard presentence reports have not been considered in making these findings of aggravating circumstances.

The Court finds these aggravating circumstances are present:

In the commission of the murders of John Lyons and Donnelda Lyons, the defendants knowingly created a grave risk of death to other persons in addition to those victims. The person or persons among the defendants who fired the fatal shots fired indiscriminately and excessively as evidenced by the number of spent shotgun shell casings found in the immediate vicinity of the Lincoln and the number of fatal wounds sustained by John Lyons and Donnelda Lyons. The location of the fatal wounds of John Lyons and Donnelda Lyons, head and chest wounds, contrasted

with the fatal hip wound sustained by Teresa Tyson, is evidence that Teresa sustained that wound as a result of the indiscriminate shooting. The position of the body of Christopher Lyons standing between his mother's legs and his fatal head wound is consistent with finding his wound was incidental to his mother's fatal chest wound.

Two. The defendants committed the offenses as consideration for the receipt or in the expectation of the receipt of something of pecuniary value, namely, the taking of the automobile and other property of the victims John and Donnelda Lyons.

Three. The defendants committed the offenses in an especially heinous, cruel and depraved manner. This finding is based on the evidence that the victims' vehicle was stopped, they and they vehicle were moved from the highway into the desert, and some, if not all, of the victims, were placed in the Lincoln automobile where at least Donnelda Lyons and Christopher Lyons were murdered. Clearly the fatal wounds of John Lyons and Teresa Tyson were inflicted in or near the Lincoln. The conclusion is inescapable that all the victims were moved from the highway under force and, considering the arsenal possessed by the defendants and the manner in which the victims were killed, very probably at gunpoint. Necessarily John Lyons, Donnelda Lyons and Teresa Tyson had time to become and must have become apprehensive about their welfare and that of Christopher at first and ultimately about all their lives before the fatal shots were fired. The

SUPERIOR COURT
YUMA, ARIZONA

stress and fear each must have initially experienced had to have grown to immence, almost unimaginable proportions before they were murdered. And it is not unreasonable to conclude that one or more of the victims witnessed the murder of the others before his or her turn came, and that very likely, from where they were found, Teresa Tyson and John Lyons were those witnesses. The emotions certainly experienced by John Lyons, Donnelda Lyons and Teresa Tyson in those last minutes of their lives were the equivalent of the severest physical torture.

This finding is also based on the senselessness of the murders. It was not essential to the defendants' continuing evasion of arrest that these persons were murdered. The victims could easily have been restrained sufficiently to permit the defendants to travel a long distance before the robberies, the kidnappings, and the theft were reported. And in any event the killing of Christopher Lyons, who could pose no conceivable threat to the defendants, by itself compels the conclusion that it was committed in a depraved manner.

Four. The defendants have not been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable which this Court can consider here. The related convictions in Pinal County in December, 1978, of each defendant of 17 counts of assault with a deadly weapon are not being ignored. Clearly they are crimes punishable by life imprisonment. However, if all of the

criminal acts of the defendants, commencing with the prison escape and ending with their apprehension, had been committed in one county of this State, very probably all of the charges would have been included in a single indictment or information. Had they been tried and convicted on all charges in one trial in that one county, would it be reasonable now to include the assault convictions as an aggravating circumstance? I think not, and I do not believe the legislature intended that result. The murder convictions were based in part on the murders occurring during the continuing efforts of the defendants to prevent lawful arrest and to aid the continuing escape of Gary Tison and Randy Greenawalt. Hence all convictions were a part of the escape and prevention of lawful arrest. In not including the assault convictions as an aggravating circumstance, I also note that the convictions in Pinal County occurred before the murder convictions here simply because Pinal County trial was scheduled for an earlier date than the trial here.

Five. The defendants have not previously been convicted of a felony in the United States involving the use of threat or violence on another person which this Court can consider. Again the Pinal County convictions are noted and are not considered a previous conviction for the reasons above stated.

Six. The defendants did not procure the commission of the offenses by payment or promise of payment of anything of pecuniary value.

Regarding mitigating circumstances, all information relevant to any mitigating circumstances, including but not limited to those set forth in 13-454 F, contained in the presentence report, presented at the sentencing hearing, received in evidence at the trials of the defendants and contained in transcribed statements taken January 26, 1979 and February 1, 1979 of each of the defendants has been considered by the Court. The Court finds none of the mitigating circumstances prescribed in 13-454 F are present, namely:

1. Neither defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired.

2. Neither defendant was under unusual and substantial duress.

3. Neither defendant's participation was relatively minor. Although each of the defendants has stated the murders were actually committed by Gary Tison and Randy Greenawalt, the participation of each in the crimes giving rise to the application of the felony murder rule in this case was very substantial. Even accepting as true their statements of who actually fired the fatal shots, it cannot be said that their participation was relatively minor. By their own statements their participation up to the moment of the firing of the fatal shots was substantially the same as that of Randy Greenawalt and Gary Tison. At the moment of the firing

SUPERIOR COURT
YUMA, ARIZONA

their participation may not have equalled that of Randy Greenawalt and Gary Tison, but their standing and watching them while armed themselves cannot be characterized as relatively minor participation.

4. Each defendant could reasonably have foreseen that his conduct in the course of the commission of the offenses for which he was convicted would cause or create a grave risk of causing death to another person.

There are mitigating circumstances present. They are:

1. The youth of the defendants, Ricky being 20 years of age and Raymond being 19 years of age.

2. The defendants have no prior felony convictions and their criminal activity before July 30, 1978 was very minimal.

3. They have been convicted of four murders under the felony murder instructions.

All references in this special verdict to the Arizona Revised Statutes are to the sections of those statutes as they were numbered at the time of the commission of the offenses and prior to October 1, 1978.

Included in the presentence report and considered by me was a psychological evaluation of the defendants' mother which defense counsel specifically requested this Court consider. That evaluation is now sealed, made a part of the record, and will be opened

SUPERIOR COURT
YUMA, ARIZONA

only on order of this Court or any appellate court.

Ricky Tison and Raymond Tison, you were charged by indictment with the commission of the crimes of four counts of murder in the first degree, two counts of armed robbery, four counts of kidnapping, and one count of theft of a motor vehicle, to which charges you entered pleas of not guilty. Thereafter the kidnapping of Christopher Lyons charge was dismissed. On the 27th day of February, 1979, as to Ricky Wayne Tison, and on the 6th day of March, 1979, as to Raymond Curtis Tison, after a trial by jury, verdicts of guilty were returned against each of you for the commission on or about August 1, 1978, of the crimes of: murder in the first degree of John F. Lyons, murder in the first degree of Donnelda Lyons, murder in the first degree of Christopher Lyons, murder in the first degree of Teresa Jo Marie Tyson, kidnapping of John F. Lyons, kidnapping of Donnelda Lyons, kidnapping of Teresa Jo Marie Tyson, armed robbery of John F. Lyons, armed robbery of Donnelda Lyons, and the theft of a motor vehicle with the intent to permanently deprive the owner of its possession.

Have you any legal cause to show, Mr. Beers, why judgment should not now be pronounced?

MR. BEERS: None except for the objections I have already noted in the presentence report.

THE COURT: Very well. Mr. Dagnall?

MR. BAGNALL: I have no objections other than my notations. Also I would ask the Court if the Court is in a position to hear a statement from either one of the defendants at this time?

THE COURT: Yes. First of all, Mr. Beers, do you wish to be heard further?

MR. BEERS: Just very briefly, Your Honor. I have explained my position fully in the memorandum. I feel when all the factors are considered that the death penalty is not appropriate for either of these boys. I have listed factors in my memorandum. I don't think I have exaggerated anything and I think when the Court looks at all the circumstances how the murders took place, the background of these boys, I think that the Court does have reason to show leniency in this case. That's all I have to say.

THE COURT: Ricky, do you have anything you wish to say?

RICKY TISON: Just that it tears me up that that family was killed. It's something that I won't forget.

THE COURT: Mr. Bagnall?

MR. BAGNALL: If it please the Court, I feel that Mr. Beers' memorandum completely refuted the memorandum issued by the county attorney's office. And regarding the evidence produced at the aggravation-mitigation hearing, all the evidence presented by the State of Arizona was presented as to matters which

are ex post facto and therefore I should think should have no, absolutely no bearing on the case.

I do believe that as I stated before that the probation officer's report's conclusions were excessively protagonistic on behalf of the position taken by the State of Arizona through the county attorney. and I ask that Mr. Raymond Tison be allowed to advise the Court of his own position in this matter.

THE COURT: Raymond, you wish to make a statement?

RAYMOND TISON: Well, I just think you should know when we first came into this we had an agreement with my dad that nobody would get hurt because we wanted no one hurt. And when this came about we were not expecting it. And it took us by surprise as much as it took the family by surprise because we were not expecting this to happen. And I feel bad about it happening. I wish we could do something to stop it, but by the time it happened it was too late to stop it. And it's just something we are going to live with the rest of our lives. It will always be there.

THE COURT: No legal cause having been shown why judgment and sentence should not now be pronounced against the defendants it is the judgment of the Court that you be punished for these crimes in the following manner - - consideration has been given to time already spent in custody:

1. For the crime of theft of

a motor vehicle with intent to deprive the owner of its possession permanently, by commitment to the Department of Corrections of the State of Arizona for a term of not less than four nor more than five years to commence from this date.

2. For the crime of robbery of John F. Lyons while armed with a gun, by commitment to the Department of Corrections of the State of Arizona for a term of not less than 50 years nor more than life to commence on this date.

Number three. For the crime of robbery of Donnelda Lyons while armed with a gun, by commitment to the Department of Corrections of the State of Arizona for a term of not less than 50 years nor more than life to commence on this date.

Number four. For the crime of kidnapping of John F. Lyons by commitment to the Department of Corrections of the State of Arizona for life imprisonment without possibility of parole, commencing on this date.

Number five. For the crime of kidnapping of Donnelda Lyons by commitment to the Department of Corrections of the State of Arizona for life imprisonment without possibility of parole, which sentence shall commence on this date.

Number six. For the crime of kidnapping of Teresa Jo Marie Tyson by commitment to the Department of Corrections of the State of Arizona for life imprisonment without possibility of parole, which

sentence shall commence on this date.

Number seven. In determining what punishment should be imposed for your convictions of murder of John F. Lyons, Donnelda Lyons, Christopher Lyons and Teresa Jo Marie Tyson, this Court has weighed the aggravating circumstances and the mitigating circumstances set forth in its special verdict. This Court finds that there are no mitigating circumstances sufficiently substantial to call for leniency. Therefore, each of you is sentenced to death on each of the murders of which you have been found guilty, and you shall be committed to the Department of Corrections of the State of Arizona to carry out that sentence in accordance with the provisions of A.R.S. 13-1654 and 13-1655. References are to those sections of the Arizona Revised Statutes as they were numbered prior to October 1, 1978 and at the time of the commission of the crimes of murder.

Because of the imposition of the death sentence the clerk is directed to enter a notice of appeal on behalf of the defendants. The defendants are advised that they also have a right to appeal any orders of this Court and other convictions. In order to do so you must file a written notice of appeal within 20 days of this date. If you do not do so then you lose your right to appeal.

If you wish to appeal and you cannot afford counsel, counsel will be appointed at no expense to you. And a certified copy of all proceedings

will be furnished at no expense to you. Your right to appeal has been set forth in a form which the clerk will give to your attorneys at this time. You may keep one of the copies. Sign the other one and it will be filed with the Court.

* * *

I, G. M. Byrnes, having been duly appointed as Official Court Reporter herein, do hereby certify that the foregoing pages numbered 1 through 162 inclusive constitute a full, true and accurate transcript of all proceedings had in the above matter, all done to the best of my skill and ability.

DATED this 29th day of May, 1979.

NOTARY PUBLIC

Exhibit D

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Banc

STATE OF ARIZONA,

Appellee,

v.

RANDY GREENAWALT,
RAYMOND CURTIS TISON
and RICKY WAYNE TISON,

Appellants.

No. 4611

FILED
FEB 24 1981
CV

Appeal from the Superior Court of Pinal County
Cause Nos. 7979 & 8007
(Consolidated)
Honorable E. D. McBryde, Judge

AFFIRMED

Robert K. Corbin — Phoenix
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Robert C. Brown — Casa Grande

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by Phillip W. Glenn
Dwight P. Callahan

Attorneys for Appellant
Ricky Wayne Tison

Appendix A.

STRUCKMEYER, Chief Justice

This appeal arises from convictions for numerous offenses committed during an escape from the Arizona State Prison in Florence on July 30, 1978, and at a roadblock near Casa Grande on August 11, 1978. We have jurisdiction by A.R.S. § 13-4031. Affirmed.

On July 30, 1978, appellant Greenawalt and Gary Tison, the father of the two other appellants, were incarcerated at the state prison. Greenawalt and Gary Tison were cell mates, serving life sentences for murder. Early that morning, appellant Raymond Tison arrived at the north annex of the prison to visit his father. While these two visited, appellant Greenawalt was in the nearby control room, preparing some prisoners' work rosters. Shortly thereafter, appellant Ricky Tison and his brother, Donald Tison, entered the yard office of the annex, carrying an ice chest. Ricky removed a shotgun from the chest and pointed it at two guards. Donald Tison passed a handgun to Greenawalt, who ordered the two guards to lie on the floor. Greenawalt then passed the gun to Gary Tison and obtained another shotgun. Gary Tison rounded up other guards in the area, escorted them into the yard office and then ordered all of them into a small storage closet. Civilians, who were at the annex to visit other prisoners, were first ordered to stand against a wall. Later they were also taken to the storage closet and locked in with the guards. Greenawalt and the Tisons then fled from the prison.

The five men eluded capture for eleven days, during which time a family of four was murdered near Yuma, Arizona. The convictions and death sentences of appellant Greenawalt for these killings were affirmed in State v. Greenawalt, ___ Ariz. ___, ___ P.2d ___ (1981) (No. 4616, filed January 23, 1981).

In the early morning hours of August 11, 1978, Pinal County sheriffs set up two roadblocks near Casa Grande, Arizona, believing the five men would be traveling through the area. Just before 3:00 a.m., a van approached one of the roadblocks, slowed almost to a stop, then accelerated past the roadblock. Two gunshots were first fired from the van. Later more shots were fired from the van as officers from the roadblock pursued in two police cars. Another roadblock was notified and as the van approached, the officers at the second roadblock heard shots and saw muzzle flashes coming from the van. Believing they were being fired upon, these officers shot at the van. After running the second roadblock, the van turned off into the desert and stopped. In the driver's seat of the van, the pursuing officers found Donald Tison, shot, unconscious and dying. Aided by a helicopter's searchlight, the officers discovered Greenawalt and the two Tison brothers, appellants herein, hiding in the desert close by. No trace was found of Gary Tison until several days later when his body was discovered in a nearby wash.

After a jury trial, appellants were each convicted of seventeen counts of assault with a deadly weapon (A.R.S. § 13-249(B)[1/]) and one count each of possession of a stolen motor vehicle (A.R.S. § 13-672.01) and unlawful flight from a pursuing law enforcement vehicle (A.R.S. § 28-622.01). Appellant Greenawalt was further convicted of escape (A.R.S. § 13-392) and possession of a deadly weapon by a prisoner (A.R.S. § 31-232); while both Tisons were found guilty of aiding and assisting an escape (A.R.S. § 13-391), with Ricky Tison alone being convicted of taking prohibited articles into prison (A.R.S. § 31-230).

1/ All citations to Title 13, A.R.S. refer to the code as it existed prior to the 1978 revisions.

The Tisons received sentences of 30 years to life for the assaults, the sentences to be concurrent. For the rest of the offenses, they received sentences of four to five years, these sentences to be served concurrently, but consecutively to the assault sentences.

Greenawalt was sentenced to terms of thirty years to life for the thirteen assaults committed during the escape and for possession of a deadly weapon, along with a four to five-year term for escape, the sentences running concurrently. Greenawalt also received sentences of thirty years to life for the roadblock assaults and sentences of four to five years for possession of a stolen motor vehicle and unlawful flight. These latter sentences are to run concurrently to each other, but consecutively to the sentences for the crimes arising out of the prison escape. All the sentences imposed on Greenawalt in this action will run consecutively to the life term he was serving prior to the escape.

Appellants contend the trial judge erred in denying their motion to change venue or venire, grant a continuance or dismiss the indictment, resulting in a denial of their right to a fair trial. The determinations of motions for a change of venue, change of venire and a continuance rest within the trial court's discretion and will not be disturbed on appeal absent a clear showing of abuse of that discretion resulting in prejudice to the defendant. State v. Greenawalt, supra; Rule 10.3(b), Rules of Criminal Procedure, 17 A.R.S.

Appellants argue the media coverage in this case was so outrageous that prejudice and unfairness must be presumed. We recognized this principle in State v. Smith, 123 Ariz. 231, 236, 599 P.2d 187 (1979), yet we found no such outrageous conduct there. Instead, it has only been found where the "proceedings * * * lacked the solemnity and sobriety appropriate to a judicial proceeding, and,

instead * * * developed a carnival-like atmosphere." State v. Greenawalt, supra, at ____; see Dobbert v. Florida, 432 U.S. 304, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). Appellants point to nothing as evidence that their trial was conducted in a less than solemn and sober manner. The record itself discloses no outrageous conduct by the parties or the press. Appellants must therefore show specific publicity which has reached prospective jurors and which is so prejudicial that the jurors cannot set it aside. State v. Smith, 116 Ariz. 387, 390, 569 P.2d 817 (1977).

Every member of the jury panel knew of the appellants in some way. This is not surprising. The escape of two convicted murderers from the state prison is clearly newsworthy. And when the two and their accomplices are not immediately apprehended, but, rather, are implicated in new murders, extensive coverage of their capture and trial is to be expected. Moreover, the public had a right to a free and open discussion on the issues crystalized by the escape and subsequent incidents; issues which touched all phases of our criminal justice system, notably capital punishment and government officials who allegedly "coddle"criminals.

Publicity about appellants and other criminal defendants serves an important First Amendment interest. See Richmond Newspapers, Inc. v. Virginia, ____ U.S. ____, 100 S.Ct. 2814, 2824-25, ____ L.Ed.2d ____ (1980); Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 587, 96 S.Ct. 2791, 2816, 49 L.Ed.2d 683 (1976) (Brennan concurring). It is in consideration of this First Amendment interest that the law requires a defendant to show the prejudice of the publicity, not simply its extensiveness. Hence, the issue is whether the jurors can actually set aside their knowledge and opinions to render a verdict based solely on the evidence produced in court. See State v. Greenawalt, supra.

While every member of the jury panel had heard about the appellants, the amount of knowledge varied markedly from juror to juror. Some knew details of the crimes, while one juror recalled absolutely nothing about the crimes. The majority of potential jurors remembered the incidents in August, 1978 in only a general and vague way. More important, even though about one-half of the panel admitted to having preconceived opinions on appellants' guilt, half of those swore the opinions were so weak they could be set aside. Veniremen who could not so swear or swore they "would try" to set the opinion aside were excused.

Appellants correctly point out that Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), holds that jurors' assurances of impartiality are not dispositive. Instead, the record of voir dire must be examined to determine if the total circumstances of the case and its publicity exhibit actual prejudice. The most important factors in this determination are the nature of the publicity and the difficulty in selecting a jury.

Appellants state they "were the subject of front page headlines, feature stories, photographs, and editorials on virtually a daily basis from July 30, 1978 through the date of trial" and that the publicity about them was "very intense and often emotion charged." The newspaper articles submitted by appellants do not support these assertions. Nearly all were dispassionate factual summaries of the alleged offenses and the progress of the manhunt. Appellants stopped being "the subject of front page headlines * * * on virtually a daily basis" near the end of August when Gary Tison's body was discovered. The newspapers published only one or two front-page stories each from that time until the December trial.

The only material that could be described as inflammatory appeared in the Yuma Daily Sun, a paper no member of the Pinal County

jury panel read, and in editorials and letters to the editor in the Arizona Republic, a Phoenix newspaper. The letters to the editor, on the whole, do not show a specific prejudice against appellants. Rather, they illustrate a disdain for all criminals and for government officials who, in the eyes of the letter writers, do not deal harshly enough with criminals. The bulk of these letters were published in August. The editorials singled out appeared on August 9 and 16, 1978. The editorials detailed the histories and past criminal records of appellants, especially appellant Greenawalt. The August 16 editorial concluded by noting that only one Tison (Donald) was dead and remarking: "That might build a horrible final score: Killers 8, Society 1."

While clearly inflammatory, the material in the Republic was shown to have little effect on the jury panel. Of the twenty-three asked, only three potential jurors knew Greenawalt was a convicted murderer. Of the two Republic readers questioned by appellants' counsel, one testified he did not remember any heated discussions about appellants or that people were "up in arms." The other reader recognized the name of the editorial's author, but the juror remarked, incorrectly, that he wrote nothing on appellants. The appellants failed to show, unlike Irvin v. Dowd, supra, that the community here was inflamed against appellants at the time of their trial.

This lack of prejudice is also illustrated by the ease of jury selection. Only forty-nine veniremen were needed to form the thirty-person panel on which the parties exercised their peremptory challenges. Of the nineteen excused for cause, only ten or eleven 2/

2/ The uncertainty in the number excused for fixed opinions is attributable to one juror who, while stating he could set aside his opinion of guilt, could not set aside the fact that these particular appellants did not testify.

were excused for fixed opinions on guilt. Appellants argue more jurors would have been excused for cause had the trial judge employed the proper standard for disqualification and had he not "intimidated" the potential jurors during voir dire.

It is contended the judge approved jurors who stated they would only "try" to set aside their opinions. As an illustration, appellants point to the following exchange between the judge and a juror:

> "THE COURT: But if you can lay aside those opinions or those prejudices or feelings you might have and decide the case as I have told you upon what happens here in the courtroom, not what you might have read about the case, not what your neighbors might have discussed with you, but if you can lay that aside and decide that case based upon what you hear in the courtroom, then you are qualified to be a juror.
>
> Can you do that, sir?
>
> [THE JUROR]: I can try.
>
> THE COURT: I guess that is all we can really ask you to do, sir."

Appellants moved for a mistrial on the basis that jurors must set aside their opinions, not simply try to do so. The motion was denied and its denial is assigned as a separate count of error. While we agree jurors must do more than try, we find no error in either the denial of the motion or in the standard utilized for jury selection. The exchange between the court and the juror, while occurring in the presence of the entire panel, occurred very early on the first day of the three-day jury selection process. During that process, each venireman was individually questioned by court and counsel outside the presence of the other potential jurors. Any venireman stating he would only "try" to set aside an opinion was excused by the court. The trial judge did not err. See State v. Clayton, 109 Ariz. 587, 592-93, 514 P.2d 720 (1973).

Citing Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959), appellants argue jurors with knowledge of appellants' other crimes should have been automatically excused. Appellants also urge us to require the disqualification of jurors holding opinions on guilt of the crimes charged regardless if the opinion can be set aside. The Supreme Court laid down the Marshall rule in the exercise of its supervisory power over the federal courts. The rule has no application to the state courts. Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). We reject both per se rules urged by appellants, preferring the test announced in State v. Schmid, 109 Ariz. 349, 353, 509 P.2d 619 (1973), that knowledge or opinion about the crime charged, collateral crimes or the defendant personally is not enough to disqualify a juror absent an inability to set aside the knowledge or opinion.

Appellants also contend the trial judge "intimidated" the jurors into testifying that they could set aside their knowledge and opinions, when in fact they could not. We believe the record reflects otherwise. Instead of intimidation, we see the trial judge taking great pains to explain to the jurors that they could serve as jurors even though they were aware of facts or even held opinions of guilt as long as they swore to set them aside. Such a concept is difficult to grasp to those unfamiliar with legal thinking and, at times, posed difficulty to this particular panel, of which only a few had served previously as jurors. Even appellants' counsel had difficulty grasping this concept. Appellant Greenawalt's attorney argued that the more intelligent jurors "are intelligent enough to know that they cannot totally set these matters aside, and that they cannot honestly say they will not be influenced by them", while the less intelligent jurors "aren't so introspective and don't look at things, they aren't willing to analyze and consider carefully the issues." We reject this argument since it is premised on the

fact, which we do not find, that the publicity in this case was extremely prejudicial and pervasive. We further reject the argument since its result is that no one, not even a judge, could ever try this case. This simply is not the law. The law presumes some people, even intelligent ones, can be dispassionate.

In their last assignment of error regarding pretrial motions, appellants argue they were entitled to a continuance to combat the effect of publicity, particularly after Ricky Tison's overnight escape from the Pinal County Jail one week before the trial. As stated previously, this motion is directed to the trial court's discretion. In light of the utter lack of evidence of community prejudice and the statements of those jurors with knowledge of the escape that they would set aside that knowledge, we find no abuse of discretion. We do not find any indication appellants were denied a trial by fair and impartial jurors. Nor do we find any abuse of discretion in the trial judge's refusal to change venue or venire or in refusing to grant a continuance.

Moving to the substantive charges against appellants, they argue the trial court erred in not granting a directed verdict as to the counts of assault with a deadly weapon committed against the civilians during the prison escape. As to this, there was testimony that appellants were holding revolvers and shotguns, that they ordered the civilians to stand against a wall and no one would "get hurt" and that later the civilians were escorted to and locked in a storage closet. Testimony also showed that one of the armed appellants "covered" the door to the closet as each person was lead into it and that a shotgun was pointed into the crowded closet as the door was shut. Appellants argue this evidence fails to show assault with a deadly weapon since there was no testimony that appellants pointed their guns directly at each civilian.

Assault with a deadly weapon is the attempt, with criminal intent, to commit a physical injury on another, coupled with the use of a deadly weapon in that attempt and the then present ability to accomplish the injury. State v. Gordon, 120 Ariz. 172, 584 P.2d 1163 (1978). When traditional deadly weapons are used, as here, the law does not impose stringent definitions on intent and attempt. The only intent required is general intent, that is, the defendant need only intend the acts which he performs. State v. Bustamonte, 122 Ariz. 105, 593 P.2d 659 (1979). As for attempt, we recently held that that does not require the pointing of a gun in a threatening manner. State v. Van Dyke, ____ Ariz. ____, 621 P.2d 22 (1980). In a more general statement, we have said:

> "when a person holds a deadly weapon in a position so that it could immediately be used to physically injure another, he need go no further toward the completion of a battery in order to satisfy the 'attempt' element inhering in A.R.S. § 13-249." State v. Gordon, supra, at 175.

When the evidence is considered in the light most favorable to the State and all inferences drawn against appellants, State v. Pittman, 118 Ariz. 71, 574 P.2d 1290 (1978), it is apparent substantial evidence exists to support a finding that the guns were held in a manner so they could be used to immediately injure the civilians. There is no requirement that a weapon be directly and solely pointed and leveled at every person. It is sufficient that the civilians were "covered" since from that fact the jury could have inferred that the guns could be used to immediately injure the civilians. This is in accord with our holding that a jury could find attempt where a defendant "attempted to bring the pistol to bear on" the victim, but did not actually point the pistol at him. State v. Seymour, 101 Ariz. 498, 499, 421 P.2d 517 (1966).

Appellants object to the admission of numerous rifles and pistols into evidence. In their brief, appellants refer to Exhibits 1 through 12 and 22. Exhibit 22 was withdrawn and never admitted. No objection was made to the admission of Exhibits 5 and 10, hence their admission cannot be made the grounds for error. State v. Glasco, 124 Ariz. 454, 605 P.2d 33 (1980). The objection to the other weapons is that there was no evidence that they had been fired or even that they were pointed out of the van during the roadblock incident. For authority, appellants cite State v. Gallagher, 97 Ariz. 1, 396 P.2d 241 (1964), where we held inadmissible a knife and scabbards found in appellant's car since "[n]one of these items were properly connected to the crime in question and had nothing to do with appellant's guilt or innocence." Id. at 8. The meaning of "properly connected to the crime in question" is unclear. Appellants take it to mean that unless a weapon was shown to have been fired or to have been pointed out of the van, the weapon was irrelevant since its admission did not make the fact of assault with a deadly weapon any more probable than not. We believe appellants' argument and interpretation of Gallagher confuses relevancy with the sufficiency of the State's evidence to avoid a directed verdict. We have said:

> "evidence is relevant if it has any basis in reason to prove a material fact in issue. It is not necessary that such evidence be sufficient to support a finding of ultimate fact; it is enough if the evidence, if admitted, would render the desired inference more probable. Udall, Arizona Law of Evidence, § 111 [p. 206] (1960)." Reader v. General Motors Corporation, 107 Ariz. 149, 155, 483 P.2d 1388 (1971) (emphasis added).

United States v. McCoy, 517 F.2d 41 (7th Cir 1975) provides a good illustration of this principle. There the appeals court held in a prosecution for passing a counterfeit bill that the trial court properly admitted other bills found in a store manager's office several days after the defendant had been detained there unattended since the bills "had a tendency to prove that the first bill had

not been passed innocently." Id. at 44. See also Weinstein, Evidence ¶ 401 [06], pp.401-21.

Officers involved in the roadblock incident testified multiple gunshots were directed at them from multiple sources within the van. There was testimony that these weapons were discovered in the abandoned van or near where appellants hid in the desert at the time of their arrest. Such facts make it more probable than not that some or all of the weapons were used to assault the officers at the roadblocks. Additionally, they make it more probable than not that appellants knowingly eluded a police car, another crime charged, with the large number of weapons further suggesting appellants freely aided and abetted the criminal activity and were not coerced into crime. A sufficient connection was established between the weapons and the crimes charged. We reject the idea that only those weapons actually shown to have been used in the assaults were admissible. Any implication in State v. Gallagher, supra, to the contrary is disapproved.

It is also contended the weapons should have been excluded since their prejudice outweighed their probative value. This argument is spurious. Numerous witnesses described these weapons and testified how and where the weapons were discovered. The weapons apparently were even exhibited to the jury during this testimony. All this was done without objection and long before the weapons themselves were admitted into evidence. We see no new special prejudice arising from the admission of the actual weapons. The analogy to unreasonably gruesome pictures is not convincing.

Appellants complain the trial judge incorrectly refused a requested instruction to the effect: "Guilt cannot be established by mere association or by presence of a person at scene [sic] even with knowledge that a crime is being committed." This instruction misstates the law and would have misled the jury since mere presence

can evidence aiding and abetting where there is preconcert. State v. Hernandez, 112 Ariz. 246, 247, 540 P.2d 1227 (1975). There was also no error committed when a simple assault instruction was refused since there was no evidence to support it. See United States v. Enos, 453 F.2d 342 (9th Cir. 1972)(federal prosecution of American Indian for violation of A.R.S. § 13-249); State v. Sanders, 110 Ariz. 503, 505, 520 P.2d 1127 (1974). We agree with the prosecutor's statement in the trial below, which is similar to the trial judge's comments in United States v. Enos, supra:

> "Your Honor, it would seem to me that there is either assault with a deadly weapon or there may not have been any type of assault at all."

or as the trial judge below replied:

> "Well, it appears to me there were either guns used there or not. If there were guns out there, it is assault with a deadly weapon."

Appellant Raymond Tison argues the trial court erred in refusing to appoint an investigator. He concedes A.R.S. § 13-1673 (now A.R.S. § 13-4013(B)), providing for the appointment of experts, only applies in capital cases. He further presents no evidence that prejudice, substantial or not, arose from the denial resulting in an unfair trial. There was no error. See State v. Peeler, 126 Ariz. 254, 614 P.2d 335 (App. 1980).

Appellants assign two other alleged errors, but they concede the errors do not amount to reversible error and were waived at trial. Appellants correctly point out that the Second Amended Judgment as to Raymond Tison contains two clerical errors. Our independent review of the record reveals a clerical error in the Amended Judgment as to Ricky Tison. These typographical errors do not require reversal or remand. See State v. Pieck, 111 Ariz. 318, 320, 529 P.2d 217 (1974); A.R.S. § 12-2103(A), 4 A.R.S.

It is ordered that any reference to Counts XIV and XIX, Cause Number 7979 in Raymond Tison's formal judgment be deleted and that any reference to Count XIV, Cause Number 7979 in the sentence for

Count IX, Cause Number 8007 in Ricky Tison's formal judgment be changed to Count XIX, Cause Number 7979.[3/]

Convictions and sentences affirmed.

FRED C. STRUCKMEYER
Chief Justice

CONCURRING:

WILLIAM A. HOLOHAN
Vice Chief Justice

JACK D. H. HAYS
Justice

JAMES DUKE CAMERON
Justice

FRANK X. GORDON, JR.
Justice

3/ Count XIV, Cause Number 7979, was dismissed as to all appellants prior to trial. Count XIX, Cause Number 7979, was the charge of bringing prohibited articles into prison. Only Ricky Tison, not Raymond Tison, was convicted on this count.

Exhibit E

IN THE SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA, Appellee, vs. RICKY WAYNE TISON, Appellant.	No. 4612 ORDER AFFIRMING JUDGMENTS OF CONVICTION AND SENTENCES (MANDATE)

Appeal from the Superior Court of Yuma County Number CR-9299
Honorable Douglas W. Keddie, Judge

Robert K. Corbin, The Attorney General
by William J. Schafer III, Bruce M. Ferg and
David R. Cole, Assistant Attorneys General

Attorneys for Appellee

Echeverria, Glenn & Howard
by Phillip W. Glenn and
Dwight P. Callahan
and
Alan M. Dershowitz

Attorneys for Appellant

Alan M. Dershowitz and
Alice L. Bendheim

Attorneys for Amici Curiae

This cause having been heretofore submitted, and the Court having duly considered same, and being now advised in the premises, files its Opinion. It is accordingly ORDERED that the Judgments of Conviction and Sentences of the trial court entered in the above-entitled cause be affirmed, to comply with the Opinion of this Court, attached hereto.

DONE IN OPEN COURT this 9th day of July, 1981.

STATE OF ARIZONA
SUPREME COURT

I, S. ALAN COOK, Clerk of the Supreme Court of the State of Arizona, hereby certify the above to be a full and true copy of the Order Affirming

Judgments of Conviction and Sentences, made and entered in the above-entitled cause by said Court on the 9th day of July, 1981.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of the Supreme Court of the State of Arizona this 11th day of September, 1981.

S. ALAN COOK, Clerk

cc:
Hon. Robert K. Corbin, Attorney General; David S. Ellsworth, Yuma County Attorney; Hon. Douglas W. Keddie, Trial Judge; Department of Corrections, Central Office; Phillip W. Glenn, Esq., and Dwight P. Callahan, Esq., of Echeverria, Glenn & Howard; Alan M. Dershowitz, Esq.; Alice L. Bendheim, Esq.; Ricky Wayne Tison.

Exhibit F

S. ALAN COOK
CLERK

Supreme Court
STATE OF ARIZONA
201-WEST WING
CAPITOL BUILDING
(602) 255-4536
Phoenix 85007

ANNA L. CATES
CHIEF DEPUTY CLERK

September 11, 1981

STATE OF ARIZONA,

Appellee,

vs.

RICKY WAYNE TISON,

Appellant.

Supreme Court
No. 4612

Yuma County
No. CR-9299

The following action was taken by the Supreme Court of the State of Arizona on September 10, 1981 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing - DENIED."

Copy of Order Affirming Judgments of Conviction and Sentences enclosed herewith.

S. ALAN COOK, Clerk

By Rebecca Lamberg
Deputy Clerk

TO:
Phillip W. Glenn, Esq., and Dwight P. Callahan, Esq., Echeverria, Glenn & Howard, 711-E East Cottonwood Lane, Casa Grande, Arizona 85222
Hon. Robert K. Corbin, Attorney General, 200 West Wing, State Capitol Building, Phoenix, Arizona 85007 ATTN: William J. Schafer III and David R. Cole
Bruce M. Ferg, Assistant Attorney General, 315 State Government Building, 402 West Congress Street, Tucson, Arizona 85701
David S. Ellsworth, Yuma County Attorney, Yuma County Courthouse, P.O. Box 1048, Yuma, Arizona 85364
Ricky Wayne Tison, Arizona State Prison, Box B-39199, Florence, Arizona 85232
Alice L. Bendheim, Esq., Bendheim & Mote, 17 East Thomas Road, Suite 1, Phoenix, Arizona 85012
Prof. Alan Dershowitz, Room 302-Griswold Hall, Harvard Law School, Cambridge, Massachusetts 02138

Exhibit G

IN THE SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA, Appellee, vs. RAYMOND CURTIS TISON, Appellant.	No. 4624 ORDER AFFIRMING JUDGMENTS AND SENTENCES (MANDATE)

Appeal from the Superior Court of Yuma County Number CR-9299
Honorable Douglas W. Keddie, Judge

Robert K. Corbin, The Attorney General
by William J. Schafer III, Bruce M. Ferg and
David R. Cole, Assistant Attorneys General

Attorneys for Appellee

Boyd T. Johnson
and
Alan M. Dershowitz

Attorneys for Appellant

Alan M. Dershowitz
and
Alice L. Bendheim

Attorneys for Amici Curiae

This cause having been heretofore submitted, and the Court having duly considered same, and being now advised in the premises, files its Opinion. It is accordingly ORDERED that the Judgments and Sentences of the trial court entered in the above-entitled cause be affirmed, to comply with the Opinion of this Court, attached hereto.

DONE IN OPEN COURT this 9th day of July, 1981.

STATE OF ARIZONA
SUPREME COURT

I, S. ALAN COOK, Clerk of the Supreme Court of the State of Arizona, hereby certify the above to be a full and true copy of the Order Affirming

Supreme Court No. 4624
ORDER AFFIRMING JUDGMENTS
AND SENTENCES
Page Two

Judgments and Sentences, made and entered in the above-entitled cause by said Court on the 9th day of July, 1981.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of the Supreme Court of the State of Arizona this 11th day of September, 1981.

S. ALAN COOK, Clerk

cc:
Hon. Robert K. Corbin, Attorney General; David S. Ellsworth, Yuma County Attorney; Hon. Douglas W. Keddie, Trial Judge; Department of Corrections, Central Office; Boyd T. Johnson, Esq.; Alan M. Dershowitz, Esq.; Alice L. Bendheim, Esq.; Raymond Curtis Tison.

Exhibit H

S. ALAN COOK
CLERK

Supreme Court
STATE OF ARIZONA
201 WEST WING
CAPITOL BUILDING
(602) 255-4536
Phoenix 85007

ANNA L. CATES
CHIEF DEPUTY CLERK

September 11, 1981

STATE OF ARIZONA, Appellee, vs. RAYMOND CURTIS TISON, Appellant.	Supreme Court No. 4624 Yuma County No. CR-9299

The following action was taken by the Supreme Court of the State of Arizona on September 10, 1981 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing = DENIED."

Copy of Order Affirming Judgments and Sentences enclosed herewith.

S. ALAN COOK, Clerk

By Rebecca Gonzalez
Deputy Clerk

TO:
Hon. Robert K. Corbin, Attorney General, 200 West Wing, State Capitol Building, Phoenix, Arizona 85007 ATTN: William J. Schafer III and David R. Cole
Bruce M. Ferg, Assistant Attorney General, 315 State Government Building, 402 West Congress Street, Tucson, Arizona 85701
David S. Ellsworth, Yuma County Attorney, Yuma County Courthouse, P.O. Box 1048, Yuma, Arizona 85364
Raymond Curtis Tison, Arizona State Prison, Box B-39198, Florence, AZ 85232
Boyd T. Johnson, Esq., Platt, Jenson & Johnson, 161 West Central Avenue, P. O. Box 278, Coolidge, Arizona 85228
Alice L. Bendheim, Esq., Bendheim & Mote, 17 East Thomas Road, Suite 1, Phoenix, Arizona 85012
Prof. Alan Dershowitz, Room 302 - Griswold Hall, Harvard Law School, Cambridge, Massachusetts 02138

Exhibit I

FILED
NEWMAN
SUPERIOR COURT

1979 MAR 29 AM 9 31

COUNTY ARIZONA
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YUMA

STATE OF ARIZONA, Plaintiff, vs. RICKY WAYNE TISON and RAYMOND CURTIS TISON, Defendants.	NO. 9299 JUDGMENT AND SENTENCE

This matter came on for pronouncement of judgment and sentence on the 29th day of March, 1979, the State being represented by Michael Irwin, Yuma County Attorney, and the defendants, Ricky Wayne Tison and Raymond Curtis Tison, being personally present before the court and represented by Michael Beers and Harry Bagnall, their attorneys of record respectively. The court informed the defendants that they were charged by the indictment herein with the commission of the crimes of: four counts of murder in the first degree, two counts of armed robbery, four counts of kidnapping, and one count of theft of a motor vehicle, to which charges you entered pleas of not guilty. Thereafter the kidnapping of Christopher Lyons charge was dismissed. On the 27th day of February, 1979, as to Ricky Wayne Tison, and on the 6th day of March, 1979, as to Raymond Curtis Tison, after a trial by jury, verdicts of guilty were returned

against each of you for the commission on or about August 1, 1978 of the crimes of: murder in the first degree of John F. Lyons, murder in the first degree of Donnelda Lyons, murder in the first degree of Christopher Lyons, murder in the first degree of Theresa Jo Marie Tyson, kidnapping of John F. Lyons, kidnapping of Donnelda Lyons, kidnapping of Theresa Jo Marie Tyson, armed robbery of John F. Lyons, armed robbery of Donnelda Lyons, and theft of a motor vehicle with the intent to permanently deprive the owner of its possession.

No legal cause having been shown why judgment and sentence should not now be pronounced against the defendants, opportunity having been given them so to show, the court, having considered all matters connected with the case, proceeded with the pronouncement of judgment and sentence.

It is the judgment of this court that each of you be punished for these crimes in the following manner:

1. For the crime of theft of a motor vehicle with intent to deprive the owner of its possession permanently, by commitment to the Department of Corrections of the State of Arizona for a term of not less than four nor more than five years to commence from this date.

2. For the crime of robbery of John F. Lyons while armed with a gun, by commitment to the Department of Corrections of the State of Arizona for a term of not less than fifty (50) years nor more than life to commence on this date.

3. For the crime of robbery of Donnelda Lyons while armed with a gun, by commitment to the Department of Corrections of the State of Arizona for a term of not less than fifty (50) years nor more than life to commence on this date.

4. For the crime of kidnapping of John F. Lyons

by commitment to the Department of Corrections of the State of Arizona for life imprisonment without possibility of parole, commencing on this date.

5. For the crime of kidnapping of Donnelda Lyons by commitment to the Department of Corrections of the State of Arizona for life imprisonment without possibility of parole, which sentence shall commence on this date.

6. For the crime of kidnapping of Theresa Jo Marie Tyson by commitment to the Department of Corrections of the State of Arizona for life imprisonment without possibility of parole, which sentence shall commence on this date.

7. In determining what punishment should be imposed for your convictions of murder of John F. Lyons, Donnelda Lyons, Christopher Lyons and Theresa Jo Marie Tyson, this court has weighed the aggravating circumstances and the mitigating circumstances set forth in its special verdict. This court finds that there are no mitigating circumstances sufficiently substantial to call for leniency. Therefore, each of you is sentenced to death on each of the murders of which you have been found guilty, and you shall be committed to the Department of Corrections of the State of Arizona to carry out that sentence in accordance with the provisions of A.R.S. §13-1654 and 13-1655. Reference is to those sections of the Arizona Revised Statutes as they were numbered prior to October 1, 1978 and at the time of the commission of the crimes of murder.

DATED this 29th day of March, 1979.

DOUGLAS W. KEDDIE

JUDGE OF THE SUPERIOR COURT

Exhibit J

instant case which did not result in a death penalty at the trial level and thus have not been reported in the appellate decisions.

There may also be a constitutional prohibition against a death sentence under these circumstances as well as the statutory prohibition outlined in A.R.S §13-454(F)(3). See Lockett v. Ohio, U.S. 57 L.Ed.2d 973, 98 S.Ct. (1978). In Lockett, the plurality of the Supreme Court held that the Ohio death penalty statute was constitutionally infirm because it provided for a limitation of the mitigating factors which could be considered by the sentencing authority. Three members of the Supreme Court indicated that there may be a constitutional problem with a statute that will allow the imposition of the death penalty when there has been no showing of an intent on the part of the defendant to kill the victim.

It must be noted that contrary to the implication in the prosecutor's memorandum, the Supreme Court did not specifically uphold the imposition of the death penalty in a felony-murder situation, it merely failed to reach that issue because it was unnecessary to do so in order to reverse Lockett's conviction. In fact, there is clear indication in that opinion that the members of that plurality are ready to entertain a challenge to the imposition of the death penalty on a felony-murder conviction. This is clearly indicated in the sentence that immediately follows the quotation from the plurality opinion found on page 3, lines 18 through 20, of the prosecutor's memorandum and is reprinted here:

> "'that states have authority to make aiders and abettors equally responsible as a matter of law, with principals, or to enact felony murder statutes is beyond constitutional challenge.'"
>
> "But the definition of crimes generally has not been thought automatically to dictate what should be the proper penalty." 57 L.Ed.2d at 988 (emphasis added).

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The prosecution has quoted extensively from Justice Rehnquist's dissenting opinion but a careful reading of the case clearly indicates that seven of the eight justices who participated in that decision reject Justice Rehnquist's position. Of the three justices who reached the issue of whether a death penalty was appropriate in a felony-murder case, Justice White and Justice Marshall rejected the death penalty for felony-murder under any circumstances and Justice Blackman made a qualified rejection of the death penalty for a felony-murder conviction.

In his concurring opinion, Justice Marshall explained the constitutional problem with imposing the death penalty in a felony-murder situation as follows:

> "She was convicted under a theory of vicarious liability. The imposition of the death penalty for this crime totally violates the principle of proportionality embodied in the Eighth Amendment's prohibition, Weems v. United States, 217 U.S. 349, 54 L.Ed. 793, 30 S.Ct. 544 (1910); it makes no distinction between a wilful and malicious murderer and an accomplice to an armed robbery in which a killing unintentionally occurs. See State v. Lockett, 49 Ohio St. 2d 48, 67 (1976) (dissenting opinion).
>
> Permitting imposition of the death penalty solely on proof of felony-murder, moreover, necessarily leads to the kind of 'lightning bolt,' 'freakish,' and 'wanton' executions that persuaded other Members of the Court to join Mr. Justice Brennan and myself in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972), in holding Georgia's death penalty statute unconstitutional. Whether a death results in the course of a felony (thus giving rise to felony-murder liability) turns on fortuitous events that do not distinguish the intention or moral culpability of the defendants. That the State of Ohio chose to permit imposition of the death penalty under a purely vicarious theory of liability seems to belie the notion that the Court can discern the 'evolving standards of decency . . . .'" 57 L.Ed.2d at 999 (citations omitted).

Regardless of whether this Court determines that there is a constitutional prohibition against sentencing a defendant to death when his conviction was based solely on vicarious liability

it is contended that the facts of this case clearly indicate that the Defendant's participation was sufficiently limited to qualify as a substantial mitigating circumstance under A.R.S. §13-454(F)(3). It should be further noted that the Lockett Opinion recites the interesting fact that of the 364 executions for homicides since 1954 for which facts are available, only eight clearly involved defendants who did not actually commit the murder and of that eight at least two hired a third person to commit the murder and thus had the requisite intent to kill. Of those eight executions, the most recent was in 1955. Thus, it would seem clear that regardless of whether there is a constitutional prohibition upon the imposition of the death penalty for vicarious liability in a homicide, the evolving standards of common sense and decency clearly indicate that such a sentence is far outside the norm.

It must be regretably noted that the prosecutor is attempting to argue to the Court that Ricky's statements concerning the facts of this case are untrue. Such an inference on the part of the prosecutor is clearly out of line for several reasons: first, Ricky's statements are absolutely, positively consistent with all the physical evidence; second, the prosecutor himself believes those statements to be true; and acting upon that belief entered into a plea bargain whereby Ricky would receive a life sentence; and third, Ricky's statement given to Tom Brawley immediately after the entry of the plea is entirely consistent with his prior statements and with the physical evidence. The prosecutor has inferred that the statement is somehow self-serving, but neglects to point out to the Court that the statement was made after the plea was entered, and the sentence substantially determined. At that time the Defendant had absolutely no reason to tell anything but the complete truth and it is contended to this Court that the prosecutor has made this

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STANFIELD, McCARVILLE, COSON, COLE & FITZGIBBONS

argument in bad faith and that he has no grounds to believe that it has any merit in law or in fact.

LAW OFFICES
STANFIELD McCARVILLE, COXON, COLE & FITZGIBBONS

B. Can the Acts of Randy Greenawalt and Gary Tison Be Imputed to Ricky Tison for Purposes of Inflicting The Death Penalty?

The aggravating circumstance in issue here is "(E)(6) the defendant committed the offense in an especially heinous, cruel or depraved manner." The first rule of statutory construction is that the court must attempt to give effect to the intent of the legislature and that it must follow the plain language of the statute unless to do so would lead to an absurdity. United States Fidelity and Guaranty Company v. Michigan Bank, 27 Ariz. App. 478, 556 P.2d 326 (1976).

This aggravating circumstance, just like the other five, refers to the actions and intentions of the defendant. The Defendant before this Court is Ricky Tison and the facts of the case are abundently clear. The question is: Did Ricky Rison commit this murder in an especially heinous, cruel or depraved manner? The answer, of course, is no. Ricky was convicted of murder because of his participation in the underlying felonies of robbery, kidnapping, and/or escape. Gary Tison and Randy Greenawalt may or may not have committed the offense in a cruel and depraved manner and that is for the Court to decide. However, it cannot be rationally argued that Ricky's actions were in any way cruel and depraved.

Had the murders been drawn out over an extended period without any effort on Ricky's part to prevent them, or if there was any indication that Ricky had reason to believe that Theresa Tyson had survived the assault, then perhaps his actions would have been cruel or depraved. However, all the evidence indicates that the shootings took place with no prior notice to Ricky, that they were over in a matter of seconds, and that no rational person would dream that anyone could have survived for even a few seconds after the shooting stopped.

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There might conceivably be a case in which a person who was not the actual trigger man could have the depraved manner of the killing imputed to him, as for example the depravity of the Manson killings should be imputed to Manson because he ordered the killings; however, when there is no indication that the Defendant before the Court had any prior knowledge at all of these killings, it borders on the irrational to impute responsibility to him for the precise manner in which they were carried out.

The prosecutor has submitted no authority for his proposition except for the attempt on page two of his memorandum to convince this Court that A.R.S §13-137 and §13-139 should apply to §13-454. There are numerous technical flaws in his reasoning, for example, it is a basic rule of statutory construction that when there is a specific statute and a general statute concerning the same matter, that the specific rather than the general statute will control. Another technical flaw in the prosecution's reasoning is that the death penalty statute has been carefully constructed to fit within constitutional parameters and that the legislature has evidenced absolutely no intent to take other portions of the criminal code and graft them on to the death penalty statute for purposes of expanding its scope.

The real flaw, however, in the prosecution's argument is that it flies in the face of a common sense reading of the aggravating circumstance being discussed here. For all of the above reasons, it is submitted that this Court should not find this aggravating circumstance.

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Did the Defendant Knowingly Create a Grave Risk Of Death to Another Person or Persons in Addition To the Victim of the Offense?

The two leading Arizona cases on this aggravating circumstance are State v. Doss, 116 Ariz. 156, 568 P.2d 1054 (1977) and State v. Blazack, 114 Ariz. 195, 560 P.2d 54 (1977). In Doss the defendant shot the victim in a place crowded with college students and in Blazack the defendant opened fire on patrons of a crowded bar. Neither case is precisely on point with the case at bar but both cases indicate an intent on the part of the Arizona Supreme Court to apply this aggravating circumstance to situations in which the defendant carries out his murder in such a manner as to endanger innocent bystanders.

Easily imagined examples of this would be the killer who places a bomb on an airplane for purposes of killing one of the passengers with the net result being the death of all the passengers or the person who poisons the water supply of an entire apartment complex for the purpose of killing one of the tenants. Such crimes are rightfully viewed by society as particularly immoral in that the perpetrator not only exhibits an extreme lack of moral sensitivity but also because many people who are in no way involved with the murderer are killed, often for the purpose of disguising the murderer's identity and the identity of his intended victim.

The prosecution has raised the interesting question of whether this aggravating circumstance is designed to also apply to multiple murders. Once again, it is submitted to this Court that the plain language of the statute, and its treatment by the Arizona courts indicates that this is not the purpose of the statute; however, it is certainly clear that multiple murders are more reprehensible than solitary murders, so there is no question but that there is a strong public policy basis in making multiple

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murders an aggravating circumstance. However, the legislature could easily have listed multiple murders as an aggravating circumstance but has apparently chosen not to do so.

The mere fact that sound public policy would be served by making multiple murders an aggravating circumstance does not grant this Court the right to graft such an aggravating circumstance into a plainly written statute, nor can it be argued that the failure to list multiple murders in the aggravation portion of the statute is a legislative oversight because there are many particularly morally reprehensible types of murders which have not been provided for in the aggravating circumstances. Some examples would be a murder committed while molesting a child under the age of 13 or a murder committed while committing mayhem on another person because the acts of the defendant would be so disgusting to organized society that the death penalty should probably ensue. There are other types of crimes where the motives of the defendant are so outrageous that civilized men might feel compelled to demand the death penalty. An example of a particularly depraved motive would be the murder of one person for the purpose of preventing him from rescuing the originally intended murder victim.

Therefore, there are many types of murder that seem particularly evil which have not been specified as aggravating circumstances.

The two cases cited by the prosecution, State v. Simants, 197 Neb. 549, 250 N.W.2d 881 (1977), and State v. Holtan, 197 Neb. 544, 250 N.W.2d 876 (1977), appear to support the reasoning expressed above as opposed to the theory advanced by the prosecution, especially the quote on lines 20 through 23 of page 6 of the prosecution's memorandum. However, the State has also cited State v. Ceja, 115 Ariz. 413, 565 P.2d 1274 (1977), and a reading of Ceja indicates language which would tend to support the

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prosecution's position. However, a careful reading of Ceja indicates that the court never reached the issue of whether a multiple murder per se creates a grave risk of harm to each victim and the court's reasoning appears to render irrelevant the fact that Randy Leon was subsequently killed, at least so far as it relates to this particular aggravating circumstance.

The evidence in this case clearly indicates that all four victims were intended victims and it is submitted to this Court that the aggravating circumstance in question applies only to the endangering of non-intended victims. Therefore, the prosecution's speculations concerning "indiscriminate shooting" are not really relevant to the presence or absence of this aggravating circumstance.

Finally, as with all the other aggravating circumstances involved in this case, the prosecution is requesting the Court to impute the actions of Gary Tison and Randy Greenawalt to Ricky Tison. No authority has been produced to support this position and it is contended that each aggravating circumstance, whether read individually or read as a whole with the entire statute, relates to the actions of the particular defendant before the Court. Therefore, it is contended that even if the Court should find that this particular aggravating circumstance is present, it should not be applied to this Defendant, but only to Defendant Greenawalt.

LAW OFFICES
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Exhibit K

Laws 1973, Ch. 138, §5, Ariz. Rev. Stat. Ann. §13-454 (Supp. 1957-1978) (Repealed 1978).

A. When a defendant is found guilty of or pleads guilty to first degree murder, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in subsection E and F, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

B. In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances set forth in subsection E or F. Any information relevant to any of the mitigating circumstances set forth in subsection F may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection E shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances set forth in subsections E and F.

The burden of establishing the existence of any of the circumstances set forth in subsection E is on the prosecution. The burden of establishing the existence of the circumstances set forth in subsection F is on the defendant.

C. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection E and as to the existence or nonexistence of each of the circumstances in subsection F.

D. In determining whether to impose a sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years, the court shall take into account the aggravating and mitigating circumstances enumerated in subsections E and F and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection E and that there are not mitigating circumstances sufficiently substantial to call for leniency.

E. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel, or depraved manner.

F. Mitigating circumstances shall be the following:

1. His capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. He was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. He was a principal, under §13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person. Added Laws 1973, Ch. 138, §5.

CERTIFICATE OF SERVICE

I, Alan M. Dershowitz, Attorney of Record for the Petitioners, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court, I have this day served a true and correct copy of this petition for a writ of certiorari, two motions to proceed in forma pauperis, two affidavits of petitioners, an affidavit of counsel, and a motion to expedite consideration and consolidate for hearing upon Respondent by sending a copy of said documents by first class mail addressed to:

Mr. Robert K. Corbin
Attorney General of
the State of Arizona
403 West Congress Street
Tucson, Arizona 85701

This 27 day of October, 1981.

Alan M. Dershowitz

OCT 27 1981
ALEXANDER L. STEVAS,
CLERK

81-5634
NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

RICKY WAYNE TISON and
RAYMOND CURTIS TISON,
Petitioners

v.

STATE OF ARIZONA,
Respondent

MOTION TO EXPEDITE CONSIDERATION OF JOINT PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF ARIZONA AND CONSOLIDATE FOR HEARING WITH ENMUND V. FLORIDA, NO. 81-5321

Petitioners respectfully move this Honorable Court to expedite consideration of their joint petition for certiorari and to consolidate their cases for argument with Enmund v. Florida, No. 81-5321, which this Court agreed to review on October 19, 1981. Petitioner's counsel has been authorized by the Attorney General of Arizona to represent to this Honorable Court that the State of Arizona, respondent in this case, joins in this motion and also requests that the Petition in this case be expedited and that this case be consolidated for argument with Enmund v. Florida. Petitioners' counsel has also been authorized to represent to this Court that the Attorney General of Arizona waives the right to file any additional submissions on the motion or petition, so that these matters may be submitted to the Court at its next conference. Petitioners and respondent represent that they are willing to comply with the briefing schedule established by this Court for the Enmund case, pursuant to which petitioners' brief will be due on December 3, 1981 and respondent's brief will be due on January 2, 1982.

As the ground for their motion, petitioners and respondents agree that the constitutional issue presented for review in Enmund v. Florida is present in this case. In Enmund, the Court granted certiorari on the following issue: "...whether a death sentence is a proportionate penalty where the killing for which the defendant stands convicted was unintentional or committed by a co-perpetrator in the course of a felony murder." Petition for Writ of Certiorari at 10, Enmund v. Florida, No. 81-5321.

Although the facts in the instant case are somewhat different from those in Enmund, the constitutional issue is the same. The petitioners in this case -- who were 18 and 19 years old when the crimes occurred -- were convicted of murder on a theory of aiding and abetting in a felony murder. They were sentenced to death and their sentences were affirmed by the Arizona Supreme Court, which concluded:

> "That they did not specifically intend that the Lyonses and Theresa Tyson die, that they did not plot in advance that these homicides would take place, or that they did not actually pull the triggers on the guns which inflicted the fatal wounds is of little significance. Ricky and Raymond Tison associated themselves with others who were willing to and had in the past committed homicidal acts."
>
> (Appendix attached to the Joint Petition for a Writ of Certiorari, pp. 32a-33a)

The issue presented by the instant case, therefore, is whether two teenage boys who did not intend to kill, plot to kill or actually pull the triggers can be executed for associating with their father and his friend who murdered four people in cold blood and "who were willing to and have in the past committed homicidal acts." (33a)

Petitioners in this case will contend that the execution of Ricky and Raymond Tison would violate the Eighth and Fourteenth Amendments. Respondents will contend that it would

not. Both sides agree, however, that the issue in this case is the same as that presented in Enmund v. Florida and that the cases should be consolidated for oral argument.

As additional grounds for the motion, petitioners represent that their present attorney, Alan Dershowitz, Esq., has done extensive research on the Anglo-American history of the felony murder rule and its relationship to capital punishment, and petitioners wish to present this research to the Court in the context of their case.

Finally, petitioners contend that although the broad constitutional issues presented by Enmund v. Florida and the instant case are the same, there are some factual differences between the cases which would provide this Court an opportunity to make distinctions among the cases, if warranted.

FOR THE FOREGOING REASONS, petitioners respectfully request that the Honorable Court grant their motion to expedite consideration of this petition and consolidate their cases for hearing with Enmund v. Florida.

By their attorneys,

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FILED
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ALEXANDER L. STEVAS
CLERK

No. 81-5634

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

RICKY WAYNE TISON and
RAYMOND CURTIS TISON,

Petitioners

v.

STATE OF ARIZONA,

Respondent

CONTINUED
JOINT PETITION FOR WRITS OF CERTIORARI
TO THE SUPREME COURT OF ARIZONA

THIS IS A CAPITAL CASE

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10/

ADDITIONAL QUESTIONS PRESENTED

2. May a state court find a waiver of issues under Miranda v. Arizona, 384 U.S. 436 (1966), although counsel requested a pretrial hearing on a motion to suppress at which voluntariness was clearly urged and all parties asked questions relating to compliance with Miranda, but defense counsel failed to specifically mention Miranda, the Fifth Amendment, or the Sixth Amendment in his oral argument?

3. Does it violate due process for a state court to refuse to review the correctness of conspiracy instructions which were offered as a basis for convicting the defendant of murder, on the grounds that the defendant was not convicted of conspiracy?

4. Does it violate due process to permit a jury to convict a defendant of murder upon a finding that the defendant conspired to aid and abet another's escape from prison, and that the escapee committed an unplanned murder thirty-six hours after the prison escape?

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OPINIONS BELOW

The opinions and judgments of the Supreme Court of Arizona sought to be reviewed are not yet officially reported, but they are reproduced in the Appendix attached to the original petition in this case. The opinion in the case of petitioner Ricky Wayne Tison is reproduced as Appendix Exhibit A(1a). The judgment in the case of petitioner Ricky Wayne Tison is reproduced as Appendix Exhibit E (87a). The opinion in the case of petitioner Raymond Curtis Tison is reproduced as Appendix Exhibit B(36a). The judgment in the case of petitioner Raymond Curtis Tison is reproduced as Appendix Exhibit G(90a).

JURISDICTION OF THE SUPREME COURT

Petitioner Ricky Tison was convicted of murder, kidnapping, robbery, and theft of a motor vehicle in the Superior Court of Yuma County, Arizona, on February 27, 1979. Petitioner Raymond Tison was convicted of the same crimes in the Superior Court of Yuma County, Arizona, on March 6, 1979. Petitioners were both sentenced to death for the murders and to prison terms for the remaining crimes on March 29, 1979. (67a-69a).

On July 9, 1981, the Supreme Court of Arizona affirmed Ricky Tison's convictions and sentences. (87a). On the same day, the Court affirmed Raymond Tison's convictions and sentences. (90a). Timely petitions for rehearing submitted by both petitioners were denied on September 10, 1981, (89a, 92a), and this joint petition for writs of certiorari was filed within 60 days of that date.

Petitioners asserted below and assert here a deprivation of their rights as guaranteed by the United States Constitution. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV, Section 1 to the Constitution of the United States, in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

State Statutes

1. Laws of 1971, Ch.78, §2, Ariz. Rev. Stat. Ann. §13-331 (Supp. 1957-1978) (Amended 1975) (Repealed 1978).

> A. A person is guilty of conspiracy in the first degree if, with intent to commit, or to have another person commit, any action constituting murder, kidnapping, extortion, robbery, forcible rape, aggravated assault, or any felony enumerated in title 32, chapter 18 [1] or title 36, chapter 9 [2], he conspires with one or more persons to engage in or cause the commission of such. Conspiracy in the first degree is punishable by imprisonment in the state prison for not more than thirty years.
>
> B. A person is guilty of conspiracy in the second degree if, with the intent to commit or to have another person commit, any action constituting any felony other than those listed in subsection A, he conspires with one or more persons to engage in or cause the commission of such. Conspiracy in the second degree is punishable by imprisonment in the state prison for not less than one year nor more than four years or a fine not exceeding one thousand dollars, or imprisonment in the county jail for not more than one year, or both.
>
> C. A person is guilty of conspiracy in the third degree if, with the intent to commit, or to have another person commit, any action constituting a misdemeanor, he conspires with one or more persons to engage in or cause the commission of such. Conspiracy in the third degree is punishable by a fine of not more than three hundred dollars, by imprisonment in the county jail for not more than six months, or both. Added Laws 1971, Ch. 78, §2. As amended Laws 1975, Ch. 22, §1.

2. Ariz. Code of 1939, 43-1192; Ariz. Rev. Stat. Ann. §13-332 (1956) (Repealed 1978).

> No agreement, except to commit a felony upon the person of another, or to commit arson or burglary, amounts to a conspiracy unless some act besides such agreement is done to effect the object thereof by one or more of the parties to the agreement.

NOTE: The preceding statutes were those in effect at the time of the crimes for which petitioners stand convicted. They were then repealed and replaced when Arizona revised its criminal code, effective October 1, 1978.

[1] Section 32-1901 et seq.
[2] Section 36-1001 et seq.

STATEMENT OF THE CASE

A. Statement of Facts

On July 30, 1978, petitioners Ricky Wayne Tison, then age 19, and Raymond Curtis Tison, then age 18, went with their older brother Donald to visit their father, Gary Tison, at the Arizona State Prison. (37a) Gary Tison was serving a life sentence for murder, as was a friend of his, Randy Greenawalt. (2a) Petitioners and their brother entered the prison about 9 a.m. and produced weapons from an ice chest. (37a) They passed a hand gun to Greenawalt, who was a trusty in the control room of that portion of the prison. (37a) The group then locked numerous guards and visitors into a closet, and walked out the front door about 9:30 a.m. (37a) They drove away from the prison parking lot, abandoned their car for a waiting white Lincoln, and drove away on back roads. (2a; Transcript of Trial of Ricky Wayne Tison, hereinafter cited as "Ricky's Tr.", 2/22/79, p. 462).

The evidence tended to show that the car in which the men were riding had a flat tire the night after the escape, and that the men flagged down the next car which drove by in the early morning hours of August 1. (3a) The car was an orange Mazda driven by John Lyons. His wife, their two-year-old child, and their teenage niece, Theresa Tyson, were with him. (2a) When the car stopped, guns were drawn by the Tisons and Greenawalt, and both cars were driven several miles down a dirt road off the main highway. (3a; Ricky's Tr. 2/22/79, p. 463). The vehicles were then parked trunk to trunk, and the Tisons' possessions were put in the Mazda. (3a, Ricky's Tr. 2/22/79, p. 463). The Lyons' possessions were then put in the Lincoln, and John Lyons' money and weapons were taken. (3a; Ricky's Tr.

2/22/79, p. 478, Ricky's Tr. 2/21/79, p. 218). The Lincoln was then driven a little further into the desert. (3a; Ricky's Tr. 2/22/79, p. 463). Gary Tison and Greenawalt shot some holes in the Lincoln, and the Lyons and Theresa Tyson were placed in it. (Ricky's Tr. 2/22/79, p. 463). Gary then sent petitioners back to the Mazda for some water (Id.) Upon their return, Randy Greenawalt and Gary Tison shot the victims. (3a; Ricky's Tr. 2/22/79, pp. 463-64).

Gary Tison, Greenawalt, petitioners, and their brother Donald then drove away in the Mazda (4a). Petitioners later helped to purchase spray paint which was used to disguise the car. (4a; 48a). After a few days the Mazda was abandoned near Flagstaff, Arizona, and was replaced by a Chevrolet pick-up obtained through a friend of Randy Greenawalt's. (4a; 49a; Ricky's Tr. 2/21/79, pp. 302, 314).

They then drove to Colorado. While they were there, a young couple, James and Margene Judge, were murdered. (Joint Sentencing Hearing, 3/14/79, pp. 12-13). The group was in the Judges' van when apprehended. (2a; 38a; Joint Sentencing Hearing, 3/14/79, pp. 11-12). There was no evidence that Ricky or Raymond played any part in the Judges' murder and neither has been tried for them.

Around 3:00 in the morning of August 11, the men came to a roadblock near Casa Grande, Arizona. The van slowed down and then accelerated through the roadblock. (2a, 74a). Shots were fired and two police cars chased the van to a second roadblock. (74a). Officers fired at the van as it ran the second roadblock and came to a stop in the desert. (2a, 74a). In the driver's seat the officers found Donald Tison, who has been shot in the head and later died of the wounds. (3a, 74a). The police found petitioners and Randy Greenawalt nearby in the desert. Gary

Tison was found dead in the desert several days later. (3a, 74a).

After Ricky Tison was arrested, his clothes were cut off with a knife (Proceedings at Motion to Suppress, 12/4/78, reproduced as Appendix Exhibit L, see pp. 144a-145a) and he was strip searched at approximately 4:30 a.m. (id.). Some of his brother Donald's blood was on him. (14a, 133a). He was placed in the back of a pickup truck and then, while still nude, was placed in a vehicle with three officers. (14a, 122a-123a). After being advised of his Miranda rights and given a blanket, he answered most of the questions asked of him. (14a). During the interview Officer Martinez suggested that Ricky might be taken back to see his brother Donald. (14a, 142a). The interview lasted approximately ten to fifteen minutes and terminated without the officers obtaining the information they sought. (14a).

At approximately 7:00 a.m., Sgt. Salyer and Officer Sanchos interviewed Ricky in the back of a car. (14a). Ricky was still nude but had a blanket. (14a). He began to talk after being told his Miranda rights again. (14a). After some preliminary questioning Ricky said that "he didn't want to talk any more." (Ricky's Tr. 2/22/79 p. 459). Sgt. Salyer testified to the ensuing events:

"At this time I started to get out of the car when someone came by and mentioned something about footprints.

Q. Did you return to the car at that time?

A. I hadn't left the car.

Q. What did you say at that time?

A. I told Ricky that there had been footprints found around the scene of the Lincoln and I asked him about what type shoes he was wearing. Again he became excited and said, 'All I know is that me and my brothers didn't shoot those people.'

Q. What was your next statement?

A. I said, 'Okay, I didn't say you shot those people. I'm just trying to find out what happened.'"

(15a, Ricky's Tr. 2/22/79 pp. 459-60)

Further questioning by Sgt. Salyer prompted numerous statements which were introduced at Ricky's trial. (15a, Ricky's Tr. 2/22/79 pp. 460-466).

After the interview Ricky Tison was taken to jail in Florence, Arizona, where he was interviewed by two more police officers. (15a). This time he was both nude and without a blanket. (15a). After telling Ricky of his Miranda rights, Officer Brawley asked Ricky "if he wanted to make a statement." (Ricky's Tr. 2/22/79 p. 473). After Ricky said that "he didn't at that time," Officer Brawley asked Ricky the whereabouts of Theresa Tyson and Gary Tison. (Ricky's Tr. 2/22/79 p. 474). Ricky's answers to these questions and to others were introduced at his trial. (Ricky's Tr. 2/22/79 pp. 474-478). At the suppression hearing, the judge found that Ricky's statements were voluntarily made and that he had understood his Miranda rights and waived them. (170a).

Petitioners were tried jointly with Greenawalt in Pinal County, Arizona, for crimes occurring at the prison and the roadblock. They were each convicted of seventeen counts of assault with a deadly weapon, and one count each of aiding and assisting an escape, possession of a stolen motor vehicle, and unlawful flight from a pursuing law enforcement vehicle. In addition, Ricky Tison was convicted of taking prohibited articles into prison. (74a) Petitioners were given concurrent sentences of 30 years to life for each of the assaults. They were given sentences of four to five years for each of the other offenses, to be served concurrently with each other but consecutively to the

assault sentences. (75a) The convictions and sentences were affirmed by the Arizona Supreme Court in State v. Greenawalt, et. al., 128 Ariz. 388, 626 P.2d 118, cert. den. Tison v. Arizona, ____ U.S. ____, 50 U.S.L.W. 3247 (1981). The opinion is attached as Exhibit D of the Appendix.

Petitioner Picky Tison was tried for and convicted of murder, kidnapping, robbery, and theft of a motor vehicle in Yuma County, Arizona. Petitioner Raymond Tison was convicted of the same crimes in a trial immediately following Ricky's.[1]

Petitioners then underwent a joint sentencing hearing before the trial judge. He sentenced them to death for the murders and to prison terms for the remaining crimes (67a-69a). Accompanying the sentence was a special verdict required by Arizona law containing the aggravating and mitigating circumstances found by the judge in imposing the sentences of death. (59a-65a, 105a). The aggravating circumstances found that pertained to the nature of the crime were precisely those found by the same judge when he sentenced Randy Greenawalt to death.

The Supreme Court of Arizona affirmed both petitioners' convictions and sentences. State v. Ricky Wayne Tison, No. 4612 (Ariz., filed July 9, 1981), attached as Exhibit A of the Appendix; State v. Raymond Curtis Tison, No. 4624 (Ariz., filed July 9, 1981), attached as Exhibit B of the Appendix. These judgements are those petitioners now seek to have reviewed by this Court.

---

[1] Randy Greenwalt was also convicted of murder, armed robbery, kidnapping, and theft of a motor vehicle. He was sentenced to death for the murders and given prison sentences for the other offenses. His convictions and sentences were affirmed by the Arizona Supreme Court in State v. Greenwalt, 128 Ariz. 150, 624 P. 2d 828, cert. den. ___ U.S. ___, 50 U.S.L.W 3250 (1981).

B. How The Federal Constitutional Issues Were Raised and Decided Below

The issue of when a state court may find a waiver of rights under Miranda v. Arizona, 384 U.S. 436 (1966), first arose below when the Arizona Supreme Court held in its opinion in State v. Ricky Wayne Tison, No. 4612, that waiver had occurred because of a failure to raise Miranda and Sixth Amendment issues at the pretrial suppression hearing. (13a). The hearing itself was held December 4, 1978, and the section dealing with the suppression of petitioner Ricky Tison's statements is attached as Exhibit "L" to the Appendix (108a-175a).

The issue of when a state court may refuse to review the content of instructions to the jury first arose below when the Arizona Supreme Court in its opinions refused to review the content of the conspiracy instructions on the ground that petitioners had not been convicted of conspiracy (17a, 39a). The specific problems with the conspiracy instructions described in this petition were not raised at the trial level, although the instructions were objected to as a whole on other grounds. (Ricky's Tr. 2/23/79, pp. 561-63; Raymond's Tr., 3/2/79, p. 383). The specific problems with the instructions described in this petition were raised as error on appeal (Brief for Appellant at 53-54, State v. Ricky Wayne Tison, No. 4612 (Ariz.); Brief for Appellant at 44-45, State v. Raymond Curtis Tison, No. 4624 (Ariz.) and were responded to by the State without argument that those issues had been waived. (Brief for Appellee at 35, State v. Ricky Wayne Tison, No. 4612 (Ariz.); Brief for Appellee at 31-32, State v. Raymond Curtis Tison, No. 4624 (Ariz.).

The issue of the due process limits upon imputing criminal responsibility for the acts of another was raised at the

trial level by petitioner Ricky Tison's attorney when he objected to the court's refusal to give the defendant's requested jury instruction on proximate cause. (Ricky's Tr., 2/23/79, pp. 559-60). Petitioner Raymond Tison's trial commenced on February 28, 1979, the day after Ricky Tison's trial had ended. The trial judge gave virtually the same instructions to Raymond Tison's jury as he had given to Ricky Tison's jury. Raymond Tison's attorney did not renew Ricky Tison's attorney's objection to the jury instructions concerning proximate cause, although on February 16, 1981, he had filed a joinder "in all Motions filed in this matter and all Memoranda of Law filed this matter by co-defendant's [Ricky Tison's] counsel, Michael F. Beers on February 14, 1979 and thereafter." The issue was raised on appeal by both petitioners (Brief for Appellant at 57-59, State v. Ricky Wayne Tison, No. 4612 (Ariz.); Brief for Appellant at 48-49, State v. Raymond Curtis Tison, No. 4624 (Ariz.)) and decided adversely to them by the Arizona Supreme Court. (20a, 39a).

REASONS FOR GRANTING THE WRIT

II. Petitioner Ricky Wayne Tison's case presents the important issue of whether a state court can properly find a waiver of rights under Miranda v. Arizona, 384 U.S. 436 (1966), where counsel requested a pretrial hearing on a motion to suppress at which voluntariness was clearly put in issue and all parties asked questions relating to compliance with Miranda but defense counsel failed to mention specifically Miranda, the Fifth Amendment, or the Sixth Amendment in his oral argument.

The continued interrogation of Ricky Wayne Tison after his statement in response to questioning that he "didn't want to talk anymore" or "didn't want to make a statement" was in violation of Miranda v. Arizona, 384 U.S. 436 (1966), Edwards v. Arizona, ___ U.S. ___ , 68 L.Ed.2d 378 (1981) and Rhode Island v. Innis, 446 U.S. 291 100 S.Ct. 1682 (1980). Yet the Arizona Supreme Court refused to consider this issue on the grounds that the defendant failed to raise any Fifth or Sixth Amendment issues at the suppression hearings held before the trial court and therefore waived those issues on appeal. (13a).

The question of whether or not a defendant has relinquished or intentionally waived his federal constitutional rights is itself a federal question. Fay v. Noia, 372 U.S. 391, 439 (1963). Where this court has found that the facts do not support a waiver finding, it has acted to insure that the states respect those rights. Ibid. While petitioner Ricky Tison presented no written motion or oral argument at the suppression hearing which specifically mentioned the Fifth and Sixth Amendments or Miranda v. Arizona, supra, it is apparent from the review of the record that the issue was raised and actually

decided in the trial court. The questioning at the hearing on the Motion to Suppress held December 4, 1978, focused on the recitation of Miranda rights and the statements which immediately followed. (123a-124a, 152a-153a, 160a, 164a) All of the information necessary to determine compliance with Miranda was elicited from the witnesses. The prosecutor argued compliance with Miranda and not just voluntariness. (168a) Furthermore, the trial court found not only that the statements were "freely and voluntarily made," but also stated, "I think they understood their rights and they waived them." (170a, emphasis added) Thus, the trial court clearly decided the Miranda issues. Significantly, on appeal, the Arizona Attorney General never asserted in any of the briefs that the Miranda issues were waived before the trial court but, instead, earnestly argued compliance with Miranda. (See Brief for Appellee at 22-23, State v. Ricky Wayne Tison, No. 4612 (Ariz.)).

Another fact which indicates, at a minimum, a lack of deliberate waiver of the Miranda and Sixth Amendment issues, is the existence of a long line of Arizona cases, culminating in State v. Edwards, 122 Arizona 206, 594 P.2d 72 (1979), rev'd, Edwards v. Arizona, supra, which recognized no difference between the issues of voluntariness and waiver. Under this Arizona case law as it existed at the time of the 1978 hearing on the motion to suppress, Arizona counsel had every reason to believe that a request for a voluntariness hearing also properly raised and preserved Miranda issues.

Petitioner Ricky Wayne Tison respectfully submits that the Miranda waiver issue merits this Court's attention not only because of the errors stated above but also because the time is ripe for this Court to eliminate the continuing confusion over the proper standard to utilize in determining when there is a intentional waiver by defense counsel of federal constitutional

rights in State trial court proceedings. Here the Arizona Supreme Court found such a waiver for failure to specifically assert the issue in the trial court, citing Michigan v. Tyler, 436 U.S. 499 (1978); Wainwright v. Sykes, 433 U.S. 72 (1977); Estelle v. Williams, 425 U.S. 501 (1976); and Henry v. Mississippi, 379 U.S. 443 (1965). (13a) Yet, Fay v. Noia, supra, at 439-440, found waiver only if there was a "deliberate by-passing" of the state's procedure for determining the issue in the form of a knowing and intelligent choice of the defendant himself. To the extent this rule is seen as modified by Henry and Wainwright in habeas corpus proceedings under 28 U.S.C. §2254(a), those decisions require an intentional action by defense counsel to bypass existing state procedures for determining federal issues. See e.g., Henry, supra, at 450. These opinions also assert that exceptional circumstances may preclude a finding of waiver regardless of the existence of intentional bypass "by counsel without prior consultation with an accused." Ibid. at 451. This case presents an excellent opportunity for this Court to establish as a matter of federal constitutional law whether simple failure to mention the Fifth or Sixth Amendments at argument in the state trial court constitutes deliberate waiver or abandonment of otherwise fully litigated federal issues and of whether this is the type of circumstance which precludes a finding of waiver under Henry.

Finally, this Court should also take this opportunity to reemphasize the constitutional standards for determining the voluntariness of petitioner Ricky Tison's statements under the flagrantly coercive atmosphere present during his questioning. This Court reiterated in Hutto v. Ross, 429 U.S. 28, 30 (1976) that the test of voluntariness "is whether the confusion was 'extracted by any sort of threats or violence, [or] obtained by

any direct or implied promises, however slight, [or] by the exertion of any improper influence.' Bram v. United States, 168 U.S. 532, 542-543 (1897) ... " In Bram, this Court held that a confession was involuntary in part because the statement offered in evidence was made either while or immediately after the defendant was stripped by the interrogating police officer. Bram v. United States, supra, 168 U.S. at 561-63. Similarly, in Malinski v. New York, 324 U.S. 401, 405 (1945), this Court said "[I]f the confession had been the product of persistent questioning while Malinski stood stripped and naked, we would have a clear case [of a coerced confession]." See also Culombe v. Connecticut, 367 U.S. 568, 622 (1961), where Justice Frankfurter reiterated for the Court that "the keeping of prisoners unclothed or standing on their feet for long periods during questioning" was deemed one of many "obvious, crude devices" for coercing confessions. In the face of these decisions, the trial court in Ricky Tison's case nonetheless held that his statements given while stripped and questioned repeatedly over seven hours were voluntary, and the Arizona Supreme Court agreed (17a).

III. This case presents the issue of whether it is a violation of due process for a state court to refuse to review the correctness of conspiracy instructions which were offered as a basis for convicting the defendant of murder, on the grounds that the defendant was not convicted of conspiracy.

The petitioners were neither charged with nor convicted of conspiracy. However, both juries were instructed as to the elements of conspiracy (Appendix Exhibits "M" and "N", 176a-183a) and were told that "A person who conspires with others to escape from legal custody, to avoid or prevent lawful arrest, to perpetrate or to attempt to perpetrate robbery or kidnap is responsible for the acts later committed by co-conspirators as a part of and during the conspiracy." (179a, 183a). The prosecutor seized upon conspiracy as a theory of vicarious liability in addition to the theory of aiding and abetting (Ricky's Tr. 2/27/78, pp. 572-3, 577-9, 581-2; Raymond's Tr. 3/2/79, p. 392). When combined with the felony murder instructions, the prosecutor was able to argue "that escape began on the 30th of July and continued until the time they were caught ... and because the defendant aided and abetted and because the defendant was a conspirator in the escape and because a killing occurred as part of that escape the State has proved that the defendant is guilty of first degree murder." (Ricky's Tr. 588); see Raymond's Tr. at 392-93, 395-96, 407, 410).

The conspiracy instructions were, however, fundamentally defective under Arizona law. Prior Arizona law had defined the elements of a conspiracy as "... an unlawful object to be accomplished, a plan embodying means to accomplish the object, an agreement between two or more persons, so that they are committed to cooperate for the accomplishment of the object, and an overt act." State v. Johnson, 120 Ariz. 170, 584 P.2d 1161, 1162

(1978). Furthermore, proof of an overt act is required by statute when the conspiracy does not have as its object arson, burglary or a felony against the person. Ariz. Code of 1939, 43-1102, Ariz. Rev. Stat. Ann. §13-332 (1956) (Repealed 1978). However, the trial judge failed to instruct either jury that it must find an actual plan embodying a means by which the object may be accomplished, or that it must find an overt act in furtherance of the conspiracy.

The Arizona Supreme Court, on review, found that petitioners' argument as to errors and omissions in the conspiracy instructions were "irrelevant" . . . "since appellant here was not convicted of conspiracy." (17a, 39a). It therefore refused to review the correctness of the instructions.

The Arizona Constitution guarantees a criminal defendant "the right to appeal in all cases." Ariz. Const. Art. 2 §24. When the death penalty is imposed, appeal is automatic and directly to the Arizona Supreme Court. State v. Richmond, 114 Ariz. 186, 560 P. 2d 41 (1976), cert. den. 433 U.S. 915 (1977). That court has repeatedly stated that in capital cases, it is required to "painstakingly examine the record" so as to ensure that the death penalty has not been improperly imposed. Id.; State v. Ceja, 115 Ariz. 413, 565 P. 2d 1274, 1276, cert. den. 434 U.S. 975 (1977).

This Court has repeatedly emphasized the critical nature of the instructions to the jury in criminal cases, Sandstrom v. Montana, 442 U.S. 510 (1979); Taylor v. Kentucky, 436 U.S. 478 (1978), and has on several occasions vacated criminal convictions where the jury could have convicted the defendant on the basis of an unconstitutional or erroneous instruction. See e.g., Stromberg v. California, 283 U.S. 359, 368 (1931); Mills v. U.S., 164 U.S. 644, 649 (1897). The Court should take this opportunity

to make clear that both the obligation of review Arizona has imposed upon itself and basic respect for due process of law require the Arizona Supreme Court to review the correctness of critical instructions given to a jury in a capital case.

IV. This case presents a fundamental issue which should be clarified by this court: What are the due process limits on a state's ability to impute criminal responsibility for murders which bear only the most tenuous causal connection to the acts of the defendant?

Both juries were instructed that aiders and abetters can be punished as principals (Ricky's Tr. 633; Raymond's Tt. 430), that a murder committed in avoiding or preventing lawful arrest or effecting escape from legal custody is first degree murder (Ricky's Tr. 637; Raymond's Tr. 434), and that a person who conspires with others to escape from legal custody or to avoid or prevent lawful arrest is responsible for acts committed by co-conspirators in furtherance of the conspiracy (Ricky's Tr. 635; Raymond's Tr. 433). The prosecutor was enabled to argue "that escape began on the 30th of July and continued until the time they were caught ... and because the defendant aided and abetted and because the defendant was a conspirator in the escape and because a killing occurred as part of that escape the State has proved that the defendant is guilty of first degree murder." (Ricky's Tr. 588; see Raymond's Tr. at 392-93, 395-96, 407, 410). Under this argument, someone who filled up the getaway car with gas before petitioners drove to the prison would also be guilty of first degree murder.

This case thus presents for review the issue of how broadly a state can define first-degree murder without violating fundamental rights of due process. Due process includes the right to be free of arbitrary action by the State. Slochower v. Board of Education, 350 U.S. 551, 559 (1956). At some point a person's causal connection with an event becomes too attenuated for him to be assessed with criminal responsibility for the event as a matter of federal constitutional law. Where someone who

conspires to aid and abet someone else's escape from prison can be held guilty of first degree murder and sentenced to death for a killing committed by the other thirty-six hours after the escape, that line has been crossed. This case presents a vehicle for this Court to clarify the due process limits on imputing responsibility for murders committed by another.

CONCLUSION

For the additional reasons stated above, Petitioners request that this Court grant their joint petition for writs of certiorari.

Respectfully submitted this the 9th day of November, 1981.

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CONTINUED APPENDIX

Exhibit L	Transcript of Suppression Hearing 12/4/78	108a
Exhibit M	Conspiracy Instructions in Trial of Ricky Wayne Tison	176a
Exhibit N	Conspiracy Instructions in Trial of Raymond Curtis Tison	180a

EXHIBIT L

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PINAL

THE STATE OF ARIZONA,	:	
	:	
PLAINTIFF,	:	
	:	
-vs-	:	No. 7979 & 8007 Consolidated
	:	
RANDY GREENAWALT, RAYMOND CURTIS TISON, and RICKY WAYNE TISON,	:	
	:	
	:	
DEFENDANTS,	:	

Florence, Arizona
December 4, 1978

BEFORE THE HONORABLE E. D. McBRYDE, JUDGE

With a Jury

APPEARANCES:

For the State:	Roy A. Mendoza, Esquire N. Victor Cook, Esquire
For the Defendant: (Randy Greenawalt)	Robert C. Brown, Esquire
For the Defendant: (Raymond Tison)	Harry Bagnall, Esquire
For the Defendant: (Ricky Tison)	Michael P. Beers, Esquire

TRANSCRIPT OF PROCEEDINGS
JURY TRIAL
MOTION TO SUPPRESS

Reported by:
Stanley T. Urban, Jr.
Official Court Reporter

the occurrence of the incident, and what has happened in between may have helped him out when he was looking at them but he is still relating clear back to the original incident when this occurred.

THE COURT: Any final argument?

MR. BEERS: I have no final argument.

THE COURT: All right. The finding of the Court is that Mr. Hodo stated this morning his identification this morning was made from his having observed the defendant on July the 30th, 1974, and it would be the Court's feeling and finding that the in-court identification of the defendant Ricky Tison by Mr. Hodo was not tainted in any way by the out-of-court procedures that may have taken place, so the motion is denied in this case.

MR. BEERS: Okay. Then I would like to continue with the motion to suppress, Your Honor.

THE COURT: Very well.

MR. COOK: Your Honor, at this time the State has agreed to go and call the witnesses and go forward.

THE COURT: All right.

MR. COOK: At this time we recall Officer Harville, Detective Harville.

JAMES HARVILLE,

called as a witness, having been duly sworn according to law testified as follows:

DIRECT EXAMINATION

BY MR. COOK:

Q. Could you state your name and occupation, please?

A. James D. Harville, Pinal County Sheriff's Department, Detective Division.

Q. How long have you been with the sheriff's office?

A. Close to three years.

Q. How long have you been involved in law enforcement?

A. In the sheriff's department, plus a year at the Arizona State Prison.

Q. Were you on duty at the sheriff's office on August 11, 1978?

A. Yes, sir.

Q. On that date did you have occasion to interview Ricky Wayne Tison?

A. Yes, sir.

MR. BEERS: Excuse me, Mr. Cook, at this time, Your Honor, I would like to invoke the rule. The remaining deputies that were present are still in the court room.

THE COURT: Are there other witnesses who are going to testify here this morning?

MR. COOK: Yes, there are, Your Honor.

THE COURT: Would you have them please come forward.

MR. COOK: Officers Solis, Salyer, Brawley, and Young, would you come forward and be sworn.

(Officers Solis, Salyer and Brawley were sworn.)

THE COURT: Gentlemen, I am sure you have been placed under the rule before, but you must remain outside the court room and do not discuss your testimony with the other witnesses, please. Thank you.

BY MR. COOK:

Q. Okay. Did you have an occasion to interview Ricky Tison on that day?

A. Yes, sir.

Q. Well, did you have occasion to interview Raymond Tison, also?

A. Yes, sir, I did.

Q. Which one did you interview first?

A. Raymond Tison.

MR. COOK: Your Honor, before I proceed I would assume that we would have the same hearing for Raymond Tison and that we could combine those two and do them at the same time, since the same interviews were taken.

MR. BAGNALL: That is correct, Your Honor.

THE COURT: Okay. We will proceed on both motions at this time.

BY MR. COOK:

Q. Now, approximately what time did you interview Raymond Tison?

A. Approximately zero five hundred.

Q. Can you describe what happened when you first approached

Raymond Tison?

A. Raymond was in the back of the pickup. I got him from the pickup and took him to Dan Martinez's vehicle. He was placed inside of Dan Martinez's vehicle. I advised him of his constitutional rights and then we started questioning him.

Q. Okay. Where was this interview taking place then?

A. At the scene on Chuichu.

Q. What was the condition of Raymond Tison at this time?

A. He seemed to be okay. I asked him if he had been hurt or anything and if he needed a doctor, and he said that his ribs were a little sore, but he didn't want a doctor. His only concern was for Ricky at that particular time. He was alert, coherent.

Q. You stated that you removed him from the back of a pickup?

A. Yes, sir.

Q. How was he dressed at that time?

A. He was nude.

Q. What did you do with him? You took him to Martinez's car?

A. Yes, sir, I did, Dan Martinez.

Q. Where were you located and where was Raymond Tison located?

A. Raymond was in the back seat on the left side of the vehicle directly behind the driver's. I was in the right front seat. Dan Martinez was also present directly

behind the steering wheel, and officer Solis was also present.

Q. What procedure did you use at that time?

A. In reference to advising him of his constitutional rights?

Q. Yes.

A. Yes, sir, I read the constitutional rights from the Miranda warning card.

Q. Do you have that card with you today?

A. No, sir, it was introduced in the court on the prior case with Greenawelt. I have a card, but not the same one.

Q. Is it the identical card as far as the questions?

A. Yes, sir.

Q. And what rights does that cover? Can you read it to us today? Is it here today?

A. Yes, sir. You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish. You can decide at any time to exercise these rights and not to answer any questions or make any statements. Then it has the waiver and it says do you understand each of these rights I have explained to you? Having these rights in mind, do you wish to talk to us now?

Q. What was his response to those two questions?

A. He said that he understood his rights and he next said that he would like to see where he stands, first.

Q. What did you say after that? What did you interpret that to mean?

A. I didn't really know what it meant. So I asked him what, will you talk to us, again, and I asked him again will you talk to us.

Q. You repeated the last question on the card?

A. Yes, sir.

Q. What was his response at that time?

A. He says -- excuse me?

Q. Did he respond to you at that time?

A. Yes, sir, he did.

Q. Did he indicate that he was willing to talk to you?

A. Yes, sir.

Q. Had any threats or coercion been expressed to him by anyone?

A. No, sir.

Q. How about prior to that time from the time that you initially came in contact with Raymond, had you seen anybody making a statement to Raymond?

A. No, sir, I didn't.

Q. Or to anyone else in the back of the pickup at that time?

A. No, sir.

Q. How was Raymond dressed once you put him into the vehicle and did the interview?

A. During the interview he had a blanket around him, a big wool blanket, and I don't know who provided him with that blanket, but he was given a blanket.

Q. Was this when the interview initially started, or later on?

A. No, it was as soon as he got to the car. I don't know whether it was while we were in transit to the car, but when he was seated he had the blanket on him.

MR. COOK: I don't believe I have any other questions at this time.

THE COURT: All right.

CROSS EXAMINATION

BY MR. BACHALL:

Q. With reference to time, what was the time? What time of day or night was this?

A. It was approximately 0300, sir.

Q. Do you recall what time the apprehension of the individuals took place, what time did the van get stopped, approximately?

A. Well, the first incident was at approximately 0256, I believe.

Q. About three o'clock in the morning?

A. Approximately, yes, sir.

Q. This was some two hours later; is that right?

A. Yes, sir.

Q. Do you know where Raymond had been in those two hours?

A. He was there at the scene in the back of the pickup.

Q. Were you there at the scene at all times while he was there?

A. Yes, sir.

Q. Did you come on the scene shortly after, around three o'clock?

A. Yes, sir.

Q. Did you have him in full view all the time?

A. No, sir.

Q. So you don't know who may have talked to him or said anything to him during all that period of two hours?

A. Yes, sir, that's right.

Q. You don't know?

A. I don't know.

Q. So that whether anybody made any threatening statements or remarks to him, you don't know at that point?

A. That's correct. I don't.

Q. All right. Now when you placed him in the car was it about five o'clock in the morning, and what was the weather like?

A. It was daylight. The sun was up, just the normal weather conditions for that particular time of the year.

Q. Did you inquire as to whether or not he needed anything to drink at that time?

A. I don't recall inquiring to that.

Q. And you don't recall whether he had had anything to eat or drink between the hours of three and five?

A. If so, I didn't see it.

Q. When he was seated in the right rear of the car, who was there? Was there anybody else in the back seat with him?

A. He was seated on the left side, sir.

Q. On the left rear of the car, excuse me, but was there anybody else seated in the back of the car with him?

A. Yes, sir.

Q. Who was that?

A. Detective Tom Solis.

Q. And Dan Martinez was behind the steering wheel?

A. Yes, and I was in the right front seat.

Q. Were you all dressed in Sheriff's uniforms?

A. Myself and Detective Solis were dressed in the S.W.A.T. uniforms. Detective Dan Martinez was in civilian clothes, as I recall it.

Q. Were you all armed?

A. Yes, sir.

Q. Were there any people standing outside, outside and near the car, any officers?

A. I requested that Officer McKenzie approach the car at the

time that I advised him of his constitutional rights, and as soon as I advised him of his rights, or shortly after that, Officer McMannis went away from the car. Now, there were people walking passed the car.

Q. Most all of them armed?

A. Well, I couldn't say whether rest of them were or not.

Q. Most of them were Sheriff's, or Highway Patrol personnel?

A. They were police officers, yes, sir.

Q. When you say that Raymond appeared to be in full possession of his faculties, he first said what to you, that he wanted to find out where he stood?

A. He said, "I would like to know where I stand, first."

Q. And then you asked him again "Do you want to speak with us"?

A. Yes, sir.

Q. And then he talked with you?

A. Yes, sir.

Q. Did any of the other officers who were in the car at the time you had this conversation with Raymond have anything to say to him?

A. Yes, sir.

Q. Who said what?

A. I don't recall who asked which questions.

Q. Now, you were the one that read his rights to him; is that correct?

A. Yes, sir, I am.

Q. And you asked him if he wanted to talk to you, and the first time he said he wanted to know where he stood, and the second time he started to talk to you? Who else was questioning him?

A. I'm not really sure I understand.

Q. Which of the other three officers, which of the other two officers were asking him questions?

A. All of us asked a question or two, or whichever. I don't recall which one asked which question. As soon as Raymond was in the car, I introduced him to all the officers as well as myself, and then that is when we advised him or I advised him of his constitutional rights. Then from that point on I asked questions, and also Solis asked some questions, and also Dan Martinez asked some questions.

Q. Prior to the time that Officer Solis asked a question, or prior to the time that Officer Martinez asked him a question, did they also read him his rights?

A. No, sir.

Q. So you were the only one that read him his rights; is that correct?

A. That's right, sir.

Q. How long did this conversation take place?

A. Approximately thirty minutes.

Q. Did you give any explanation or clarification of what the

Miranda warning meant after he said, "I want to see where I stand"?

A. No, sir. I just asked him again if he would talk to us.

Q. You asked him again if he understood the implications of all of the matters listed in the Miranda warning?

A. No, sir.

Q. You did not?

A. I asked him the first time if he understood each of his rights.

Q. Yes. And he said "Yes"?

A. Yes.

Q. He said, "I want to know where I stand"?

A. Yes.

Q. And then what was your reply to that?

A. That is when I asked him again if he would talk to us.

Q. You didn't ask him when he said "I want to know where I stand," whether he didn't really understand the Miranda rights?

A. No, I didn't. I didn't advise him of his rights again.

Q. Then you interrogated him for about thirty minutes, all three of the officers; is that correct?

A. Approximately thirty minutes, yes, sir.

Q. Did he have any change in his appearance, or his attitude from the time you first started talking to him and when you finished with him?

A. No, I don't think so.

Q. Do you know where he was placed afterwards, after you left him? How did you leave him?

A. I took him from that vehicle, and I am trying to think, I can't recall off hand whether I left him in that vehicle or took him out of the vehicle.

Q. If you left him there, who would have been staying there with him?

A. Well, I was asking various guards, or officers from around there, at the scene to provide various vehicles so that we could get the suspects into different vehicles and also that they would be there and watch them, also, and I don't recall which car he was left in and who was there.

Q. And after you left him, where did you go?

A. We next talked to Raymond, or, correction, Ricky.

Q. All right.

MR. BAGNALL: I have no further questions.

MR. COOK: I have just a couple more.

REDIRECT EXAMINATION

BY MR. COOK:

Q. How did the interview terminate?

A. They -- he said he had nothing else to add, and at that time, time was what we considered at that point extremely important, and we were trying to get as many of

the interviews conducted with the information that we was hoping to gain, so we just broke away from the interview. Then I went to the next one and got him.

Q. Did he ever invoke his rights and say, "I want an attorney, or I don't want to talk any more"?

A. No, sir.

Q. Once again, I can't remember if I asked you, but why did you repeat the question, "Do you want to talk to us," or whatever you said?

A. Well, I was looking for a yes or no, a yes or no answer, and I didn't really understand by, "I would like to see where I stand, first," I didn't understand that.

Q. Did you reread the card, the last line on the card, or did you just put it in your own words?

A. The second time I just put it in my own words. I said, "Will you talk to me?"

MR. COOK: I have no other questions, at least as to Raymond Tison. We will go on with Ricky, because he did the interview with Ricky, also.

BY MR. COOK:

Q. After you left Raymond, what did you do?

A. We next got Ricky and we put Ricky in the vehicle. Again, Officer Solis, Martinez, and myself, we were all three in the vehicle, and Officer Solis advised Ricky of his

constitutional rights.

Q. When you took Ricky from the truck, what was his physical condition at that time?

A. He was also nude, and he had a lot of blood on him, which was a concern, but he seemed to be alert, appeared coherent and alert.

Q. Did he have any trouble walking to the vehicle?

A. No, sir.

Q. What occurred once you arrived at the vehicle where you did take the interrogation?

A. Officer Solis advised him of his constitutional rights.

Q. Did Ricky also receive a blanket?

A. Yes, sir, he was also given a blanket, and he had it, if I recall, I think Ricky had it over mostly the lower portion of his body, and the upper portion of his body was still exposed and the blood was still there.

Q. What occurred after you got him there? Immediately did you just put him in the car, got him a blanket, and then did you ask any questions before his rights were read to him?

A. I was inquiring about his health because of the blood, and also from what Raymond had told me on the interview with Raymond, as to his physical condition, as to whether he was hurt or not, and he said he wasn't hurting. Officer Solis advised him of his constitutional rights.

Q. Can you tell us how he did that?

A. How he advised him of his rights? No, I can't. I don't know whether he read it. It sounded just like mine, but I don't know whether he read it from a card. He had one. He had one out, but I couldn't say that he actually read it.

Q. After he read him the rights, or advised him of his rights did Ricky make any statements to you?

A. Yes, sir. He started talking to us.

Q. Did he ever tell you that he did not want to talk to you?

A. No, sir.

Q. Did he ever make any such statement as Raymond had made?

A. Pardon me?

Q. Did he ever make such a statement as Raymond had made that he wanted to see where he stood?

A. No, sir, I didn't hear him.

Q. Did he ever invoke any of the Miranda rights?

A. No, sir.

Q. Did you ever see anybody make any threats to Ricky, or anyone else, for that matter, any of the three defendants?

A. No, not that I -- I don't recall anybody threatening him during the time that he was with us.

Q. When you were talking with Ricky, was he coherent?

A. He appeared to be coherent, yes, sir.

Q. Did he have any problems in talking with you that would cause you to believe that maybe he didn't understand what

he was doing?

A. No, sir, not whatsoever.

Q. How did your interview terminate with Ricky?

A. It just was no further information, and once again we wanted to go interview the third suspect, and the information, or the conversation was repeated over and over, so we just terminated. There was you know, nothing unusual about the termination.

MR. COOK: I don't believe I have any other questions at this time Your Honor.

CROSS EXAMINATION

MR. BEERS:

Q. What time did you arrive at the scene of the roadblock?

A. It was just shortly after the first call came out that the van had gone through the roadblock. We were just a few miles away from it at that time and we proceeded right away to it, possibly five or six, seven minutes.

Q. About what time was this?

A. Shortly after three, approximately.

Q. And what time did you interview Ricky?

A. Five thirty-one I believe, sir, approximately.

Q. When was the first time you saw Ricky that night?

A. I seen, well, not knowing who it was, I don't know one from the other, but I seen all of them at approximately

three fourty-five or four o'clock, something like that there.

Q. And where were they at that time?

A. They were at or in the area of the van and they were being taken from the van to the back of the truck.

Q. Did they have their clothes on at that time?

A. No.

Q. Do you know how their clothes were taken off?

A. No.

Q. Did you see them being put in the truck?

A. Some of it, yes.

Q. Did they have blankets with them in the truck?

A. No, sir.

Q. Did you see anyone talk to them while they were in the truck?

A. No, sir.

Q. How did Ricky get from the truck to the car?

A. When I went and got him for the interview?

Q. Yes.

A. He walked.

Q. And he was nude at this time?

A. I don't remember whether the blanket was given to him as soon as we extracted him from the truck or not, so I can't recall.

Q. But he did not have any clothes on?

A. Well, I can't recall, he wasn't clothed, but he could have had a blanket. I don't recall whether he came from the truck to the car with a blanket on him or not.

Q. How far is it from the truck to the car?

A. I don't know.

Q. Well, would it be more than ten feet?

A. Yes, sir, I think so.

Q. Would it be more than fifty feet?

A. I would have to say no, I don't believe it was, but I don't really recall.

Q. Can you give us your best estimate?

A. Well, I would say more than fifty feet, but once again, I don't really recall.

Q. Did Ricky have shoes on.

A. No, sir.

Q. Was this walk across the desert, or was it county road or what?

A. Across the road, it was on Chuichu Road.

Q. From one side of the road to the other side of the road?

A. Yes, sir, and slightly catty-corner, down, diagonal.

Q. You said Ricky was covered with blood. Would you describe in more detail what you mean by that?

A. He had a large amount of blood on the upper part of his body in the chest area. It was dried blood, none of it appeared to be fresh, and there was some blood on the

side of his neck.

Q. Did you have a doctor examine him prior to your questions?

A. No, sir.

Q. Did you ask him if he wanted a doctor?

A. Yes, sir.

Q. You personally never read Ricky his rights; is that correct?

A. That's correct, sir.

Q. Approximately how many officers were at the scene of the roadblock at the time Ricky was interviewed?

A. More than a hundred I would estimate.

Q. And there were three of you in the car with Ricky just like with Raymond?

A. Yes, sir.

Q. And who was sitting in the back seat with Ricky? Was that you?

A. No, sir, I was in the front seat. Officer Solis was in the back seat.

Q. And was Officer Martinez in the front seat?

A. Yes, sir, I think so.

Q. Did you tape record your conversation with Ricky?

A. No, sir.

Q. Did you take notes?

A. Yes, sir.

Q. Do you still have those notes?

A. No, sir.

Q. What did you do with them?

A. Well, after they are transposed into the form, the typed form that we have, we dispose of them, or I do.

Q. Would all three of the officers, including you, could all of you hear what Ricky was saying clearly?

A. Yes, sir.

Q. Did the other two officers take notes?

A. I believe they did.

Q. Do you know what they did with their notes?

A. No, sir.

Q. Were there any officers around the car at the time you interviewed Ricky, standing outside the car?

A. I honestly don't know, sir.

Q. Approximately how many vehicles were at the scene of the roadblock when you interviewed Ricky?

A. I don't know. There was just lots of them.

Q. You testified earlier that time was a concern. Would you explain that more fully?

A. Well, we had information that the van was seen at this pond, and that there was possibly somebody in that particular pond, and we were trying to obtain whether or not they had just been dropped off or possibly that they were still at the pond. We were trying to get as much of the information so that we could search the area for

the people that the van belonged to. At that time we didn't know who it was.

Q. So at the time you interviewed Ricky, you were primarily concerned with the location of the owners of the van; is that correct?

A. Yes, sir, and also another concern was Teresa Tyson.

Q. The location of Teresa Tyson, she was still missing at this time; is that correct?

A. Yes, sir.

Q. And you were also concerned with the location of Gary Tison, I presume?

A. Yes, sir.

Q. Do you feel that your concerns were probably similar to the concerns of the other two officers that interviewed Ricky?

A. I can't answer for Sergeant Martinez, but I do think that that was one of the major concerns with Officer Solis.

Q. And that was the primary direction of your questions, towards finding answers to those three problems; is that correct?

A. That's correct, sir.

Q. Do you know how long Donald Tison lived after he was shot?

A. No, sir.

Q. Did you ever say anything about Donald Tison to Ricky?

A. Did I say anything about Donald?

Q. Yes.

A. No, not that I recall, no.

Q. Did you ever hear anything said about Donald in Ricky's presence?

A. Yes, sir.

Q. What was that?

A. Something to the effect, well, Officer Dan Martinez, and I don't recall the quote but, we could take you back and show you Donald, or something to that effect. I don't remember the exact words, but it was something like that there.

Q. Was that before or after you interviewed Ricky when Mr. Martinez made that statement?

A. That was, I believe, well into the interview, and I think it was --

Q. But it was before the interview was over?

A. Yes, I think it was almost at the time it was concluded.

Q. Did you ever ask Ricky whether he needed anything to eat or drink?

A. No, sir, I don't recall asking him that.

Q. Did you ever ask Ricky if he wanted to get cleaned up?

A. No, sir.

Q. Did you ever ask Ricky if he wanted any clothes?

A. No, sir.

Q. Was it dark or light when this interview took place?

A. It was light.

Q. Do you know how long Ricky was held at the scene of the arrest after you interviewed him?

A. No. No, I don't.

Q. Well, do you know approximately what time he was taken back to town?

A. All I can say, it wasn't too long after we got through with the interviews, because we were trying to find vehicles to get him back, somebody to take him back to town.

Q. Did I ask you previously how many vehicles were at the scene?

A. Yes, sir.

Q. And, how many was that?

A. I said I didn't know, that it was over a hundred, and it was lots of them.

Q. So, do you have an opinion on why it took so long to take Ricky and Randy back to town?

MR. COOK: Your Honor, I am going to object, just because it is not relevant.

THE COURT: I really have no way of telling. If you know, go ahead and answer.

A. (The Witness) No, sir, I don't know.

MR. BEERS: I have no further questions.

MR. COOK: Just a couple, officer.

REDIRECT EXAMINATION

BY MR. COOK:

Q. What were most of the officers out at the roadblock doing during your interrogation; do you have any idea?

A. Well, I think most of them were involved in a search for Gary. There was a lot of people walking around going to and from the area where the command center was set up at.

Q. Were there ever any great numbers gathered around your car that you ever saw?

A. No, sir.

Q. When you asked Ricky if he needed a doctor, what did he state?

A. He said he wasn't hurt, and I asked him about the blood that was on him, and he told me it wasn't his.

MR. COOK: Okay. I have no other questions, Your Honor.

MR. BEERS: No further questions.

MR. MACHALL: I don't have any questions, Your Honor.

THE COURT: Thank you. You may step down.

MR. COOK: At this time we call Tom Jolis.

We would ask that Detective Marville be excused.

MR. BEERS: No objection.

MR. MACHALL: I have no objection, Your Honor.

THE COURT: Okay. You may be excused. Thank you, sir.

TOM SOLIS

called as a witness, having been first duly sworn according to law, testified as follows:

DIRECT EXAMINATION

BY MR. COOK:

Q. Would you state your name and occupation, please?

A. Tom Solis, detective, Pinal County Sheriff's Department.

Q. Were you working for the sheriff's office on August 11, 1973?

A. Yes, I was.

Q. On that date, did you have occasion to interview Ricky Tison?

A. Yes, I did.

Q. Do you recall approximately what time that was?

A. Approximately 5:30 a.m., August 11.

Q. When did you first come in contact with Ricky?

A. Just, oh, I would say an hour or so before that we started the interview.

Q. You had seen him at that time?

A. Yes.

Q. Okay. What I am asking is, when did you first start talking to him, and where did you meet him?

A. Okay. That was at Chuichu and Cocklebur Road, just a

little south of Cockleburr Road.

Q. What were you doing at that time?

A. We were out on a -- myself and Detective Marville were in the area there at the time when the roadblocks were set up, and after it was reported that a van had gone through the roadblocks, we arrived there soon after.

Q. Okay. When did you first -- where were you when you first started the interview?

A. We were in Detective Dan Martinez's car.

Q. This is with Ricky or Raymond?

A. With Ricky. I was in the back seat of Dan Martinez's car.

Q. How had you gotten to the car? Is that where you initially met Ricky?

A. No, I had met him earlier where the van wrecked, or where the wreck where the van was at, right after he was brought out from around the area of the van.

Q. Right after he was apprehended then?

A. Yes.

Q. Were you there when they did the search of him?

A. Yes.

Q. Were you there when they transported him from the area of the van, of the wreck, itself?

A. Yes.

Q. At any period of time did you ever see anyone make any threats to Ricky or Raymond?

A. Not that I can recall.

Q. What happened after they transported them? Where did they take them to from the scene of the wreck itself?

A. Okay. From the wrecked van, they took them -- or we took them back toward Cooklebur road, approximately a quarter of a mile.

Q. What did you do when you arrived at that destination at Cooklebur?

A. Okay. They remained in the back of the pickup until they were strip searched.

Q. Okay. During this procedure, did you see any threats?

A. No.

Q. Any coercion placed upon them, Ricky or Raymond?

A. No.

Q. After the strip search, what happened to them?

A. Okay. After the strip search, they were placed back in the pickup and then later on approximately around five o'clock, they were placed and seperated to different vehicles for the purpose of being interviewed.

Q. Okay. Which interview did you participate in at first?

A. Raymond Tison.

Q. And where was that?

A. That was in Don Mortimer's car that was parked on Chuichu Highway.

Q. Did you escort Raymond over to the car?

A. I believe myself and somebody else. I can't recall who.

Q. Do you recall if he had any problems walking to the car?

A. No.

Q. No, you don't recall?

A. I don't recall him having any problems.

Q. Okay. And once you were in the car, who read Raymond his rights?

A. Ed Herville.

Q. At any time did Raymond invoke his Miranda rights?

A. No, no.

Q. And was any coercion or threats used upon Raymond while he was in the car while you were present there?

A. No.

Q. Did anybody come and stand and look in the car or do anything that you ever observed?

A. Not that I recall, no.

Q. Did Raymond make a statement to you, not the text of the statement, but did he answer your questions?

A. Yes, he did.

Q. Were you going to say most of the questions?

A. Yes, most of the questions he answered.

Q. Did he ever during the questioning period state that he didn't want to talk to you any more?

A. No.

Q. That he wanted an attorney or anyone else?

A. No.

Q. How did the interview terminate? What caused it to stop?

A. We just -- at that point, I guess we just didn't ask him any more questions. We just decided to go ahead and terminate the interview at that time.

Q. What did you do after that?

A. We brought Ricky back there and started interviewing Ricky.

Q. Who read Ricky his rights?

A. I did.

Q. How did you do this? Did you read it from a card, or did you do it from memory?

A. I believe I had a card. I think I read from a card.

Q. Do you have that card with you today?

A. No.

Q. Do you recall what the card looked like? Do you have any set, standard cards, or did you borrow from somebody else?

A. We have standard cards.

Q. Is that the only card that you have ever carried?

A. I carried one most of the time, but usually that one.

Q. Have you ever seen Ed Harville's card?

A. I have seen him, yes, take it out in front of me.

Q. When he read Raymond his rights, were those the same rights that you advised Ricky of?

A. Yes.

Q. And did Ricky ever state that he wanted to exercise any of those rights?

A. No.

Q. Did he ever refuse to answer any of your questions?

A. No. He went ahead and answered most of the questions.

Q. Did you ever see Ricky invoke any of his rights?

A. No.

MR. COOK: I have other questions then.

CROSS EXAMINATION

BY MR. BAGNALL:

Q. What time did you actually arrive on the scene, right after three o'clock in the morning?

A. Right after, at three o'clock, somewhere around there. It was around 2:45 when we actually heard that.

Q. The roadblock had picked up a van?

A. Right, right. And we left our area approximately 2:45, and we arrived there either before three o'clock or right at three o'clock.

Q. All right. From three o'clock until five o'clock when you had this interview with Raymond, did you have Raymond under your continual observation during all that time?

A. Well, while we were interviewing him.

Q. No. Between the hours of three and five before you started the interviewing of him.

A. Yes.

Q. Did you have him under your personal continuous observation all that time?

A. No.

Q. So you do not, you can't say whether or not other individuals approached him and talked to him or threatened him?

A. No.

Q. When were the men strip searched before five o'clock, how long before that were they strip searched?

A. Before five o'clock?

Q. Yes, five o'clock at the time you started interviewing Raymond, how long back of it was it that they had been strip searched?

A. I would say approximately, probably around 4:30.

Q. About a half hour elapsed between the time they were searched and the time they were given a blanket, or Raymond was given a blanket?

A. Somewhere around there.

Q. Did you have an opportunity to closely observe Raymond, his manner and his manner of answering questions, the manner in which he acted?

A. Yes. Raymond you mean?

Q. Yes, Raymond, did he appear to be acting strange, or did he appear to be acting as though he had all his faculties?

Did he understand what he was doing? Did he seem to understand what he was doing?

A. Yes.

Q. Did you inquire as to whether or not he needed anything to eat or drink at that time?

A. Had he had anything to eat or drink?

Q. Did you inquire as to whether or not he had had anything to eat or drink?

A. Yes, I believe so.

Q. About when did you do that? Before the interview began, or after it began?

A. It was probably around during the interview or right after the interview.

Q. And if he responded, what did he respond?

A. I don't recall.

Q. Did you give him anything to eat or drink?

A. No, I didn't.

Q. Do you recall whether he said that he needed some food or something?

A. No, I don't recall him saying that he needed anything.

Q. But you recall the matter coming up in the conversation?

A. Yes.

Q. In the area or around the automobile where you were conducting the interrogation there were a number of police officers. Can you estimate to the best of your

recollection in the whole area how many police officers were in the area, sheriff's department, highway patrol, so forth like that?

A. There was quite a few, but I couldn't say.

Q. Did you see McKenzie around there at that time?

A. Yes.

Q. Did he have his dog with him?

A. No, I didn't see the dog.

Q. So you would say about a hundred officers?

A. Possibly.

Q. And how many varying different type of sheriff's cars, highway patrol cars, police vehicles, would you say were there from the close area where you had the interview?

A. I don't know.

Q. Your best estimate?

A. I would say a dozen or more or better.

Q. And they all had seals on them so you could tell they were police cars?

A. No, not all of them.

Q. Were most of the officers who were in the area in uniform and carrying weapons?

A. Yes.

Q. Were there any civilians in the area at all, any attorneys other than the county attorney's office?

A. No, not that I can recall.

Q. Were there any private lawyers around there any place?

A. I didn't see any.

Q. In the car with you there was Officer Harville and Officer Martinez; is that correct?

A. Yes.

Q. Now, you heard what officer read his rights to Raymond and asked him some questions and he answered some of Harville's questions; is that right?

A. Yes.

Q. When you questioned him, did you read him his rights?

A. No.

Q. When Mr. Martinez questioned him, did he read him his rights also?

A. No.

Q. Do you recall that when Officer Harville had finished reading his rights to Raymond and asked him if he wanted to talk to him that he said something like;"I would like to know where I stand," or something like that?

A. Seems like it, yes.

Q. What did Officer Harville say immediately after that?

A. It seems like he said, "do you want to talk to us now?"

Q. And then what happened?

A. And then he started talking.

Q. Have you discussed this matter at all with Officer Harville since the time, the morning when all this

happened?

A. This particular subject?

Q. Yes.

A. We had discussed the roadblock, and what, you know, during the interviews, right after that, but --

Q. You don't recall discussing this particular interview with him at any time?

A. No. He submitted his report and I submitted mine, and that is about it.

Q. Have you read his report?

A. No.

Q. Have you read Officer Martinez's report?

A. I think I did, briefly.

MR. MACNALL: I have no further questions.

CROSS EXAMINATION

BY MR. LEEPS:

Q. When Ricky was interviewed, did he have any clothes on?

A. No.

Q. When were his clothes taken off; do you know?

A. When they were strip searched.

Q. And approximately what time was that?

A. I would say approximately around 4:30.

Q. Were you present when they were strip searched?

A. Yes.

Q. How were their clothes taken off?

A. They were removed from them.

Q. Were they cut off?

A. Yes, part of them were.

Q. Were they cut off with a razor blade, with a knife?

A. With a knife, I believe.

Q. Would you explain why it was necessary to cut their clothes off?

A. Okay. The clothes were on pretty tight, and then they were still cuffed, so some of the clothes wouldn't come off just by taking them off. They had to be cut off. They was having a hard time taking them off.

Q. What was done with the shirt that Ricky was wearing?

A. I didn't hear you.

Q. What was done with the shirt that Ricky was wearing?

A. Okay. All the clothes, as they were being stripped down, I was trying to keep them straight for evidence, you know, and I was trying to keep up with all of it, so I would gather like all of Ricky's clothes and all of Raymond's clothes, and the other person there.

Q. Did you observe blood on Ricky's clothes?

A. Not that I remember.

Q. Did you observe blood on Ricky?

A. I believe he had some scratches on him, but very little blood.

Q. And you testified there were approximately a hundred

officers at the scene?

A. Yes, sir, I would say. I am not sure. There was quite a few.

Q. Would it be fairer to characterize the area as an isolated location?

A. Yes.

Q. Did you ever ask Ricky if he wanted anything to eat or drink?

A. I don't remember, I remember asking if he needed any medical attention of any kind. It seems like somebody did ask him, but I don't recall who or approximately when.

Q. Do you know approximately what time Ricky was taken back to town?

A. It was approximately seven, I believe. I could be wrong.

Q. He was arrested at approximately three; is that correct?

A. Yes.

Q. Would you explain why it took so long to take him back to town?

A. We were still trying to secure and trying to maintain the area there looking for the other suspect.

Q. Well, you didn't need Ricky's help to do that, did you?

A. I don't know.

Q. Did you take Ricky back a short time after he made the second statement to the officers?

MR. COOK. Your Honor, I am going to object to the relevancy

of this, talking about his statement at that point in time, and he has indicated he doesn't know what happened after that.

THE COURT: Try a different question. Would you ask the question again, please?

BY MR. EBERS:

Q. Is it correct that you testified that Ricky was taken back to town at approximately seven o'clock?

A. Yes.

Q. Do you know what was done with Ricky after you talked to him at 5:30?

A. Yes. Actually what I was doing, I was trying to assign people for transportation to Florence, and to the best of my knowledge I assigned some officers, for two officers each to take each individual seperately, and then I believe there was a factor there about the people at the roadblock, the roadblocks that were blocked coming in, there was quite a few, quite a few people there, and trying to get through.

Q. When did you first assign officers to take Ricky back to Florence?

A. It was approximately 6:30, somewhere in that area.

Q. Could you explain why nobody was assigned to take Ricky back to Florence earlier?

A. I don't know why.

Q. Do you know when Ricky finally got some clothes?

A. No.

Q. Did you ever make any statements to Ricky concerning his brother Donald?

A. Not that I recall.

Q. Did you ever hear anybody make any statements that Ricky might have heard concerning Donald?

A. No, I don't know.

Q. Was Officer Martinez in the car with you and Detective Herville when Ricky was questioned?

A. Yes.

Q. Does that refresh your memory concerning statements made about Donald that Ricky might have heard?

A. No, I don't.

Q. Did you tape record your interview with Ricky?

A. No, I didn't.

Q. Did you take notes?

A. Yes.

Q. Do you still have those notes?

A. I am not sure. I might have them.

Q. Do you normally keep the notes you make of interviews?

A. Most of the time I do, and a lot of times I just dispose of them as soon as I make a report, a formal report on them.

Q. You don't have any specific habit then as to what you do regarding your notes?

A. Do I have what?

Q. You don't have any specific habit, you don't always keep them or always destroy them; is that correct?

A. I usually keep them.

Q. Is there any policy in the Pinal County Sheriff's Department about keeping notes or destroying notes?

A. No.

Q. You made a report of this incident; is that correct?

A. Yes.

Q. Did you review that report before your testimony today?

A. I read it briefly.

Q. If you are recalled to testify in court, would you review that report prior to testifying in court?

A. Yes.

Q. You used that report to refresh your recollection, or do you actually remember what was said at this interview?

A. I usually read it to refresh dates and times, and this sort of thing, and most of the things I try to remember.

MR. BEERS: No further questions.

MR. BAGNALL: I don't have anything further.

REDIRECT EXAMINATION

BY MR. COOK:

Q. Did Ricky ever ask for his clothes, or any clothes?

A. I don't think so.

Q. Okay. On your notes, do you generally incorporate those

into your formal report?

A. Yes, I do.

Q. On this time in particular, do you recall leaving anything out of your formal report that was in your notes?

A. Not that I can recall. I tried to use about everything I had on those notes.

MR. COOK: I have no other questions.

MR. BEERS: Nothing further.

MR. BAGNALL: Nothing further.

THE COURT: You may step down. Thank you, Mr. Solis.

MR. BAGNALL: Release him?

MR. COOK: Yes, I would ask that he be excused.

MR. BEERS: No objection.

MR. BAGNALL: No objection, Your Honor.

THE COURT: All right. You may be excused.

Just time wise, should we break for lunch? Do you have some more witnesses?

MR. COOK: Yes, Your Honor, we have three other witnesses. I think we will probably just call two of them, but this appears to be as good a time as any to break for lunch.

THE COURT: What time, 1:30?

MR. COOK: That will be fine, Your Honor.

THE COURT: We will reconvene at 1:30.

(Court was then recessed at 11:55 a.m.)

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THE COURT: Okay. I understand Mr. Bagnall has waived his presence, since the remainder of the testimony does not concern his client; is that right, gentlemen? Do I misstate it?

MR. BEERS: That is my understanding, Your Honor.

THE COURT: He said he would be here as soon as possible.

MR. BEERS: Yes, Your Honor.

THE COURT: Is that all right, Mr. Tison?

RAYMOND TISON: Yes.

THE COURT: You may proceed.

MR. COOK: At this time we call Officer Salyer.

THE COURT: Is he here?

MR. COOK: Yes.

ELLIS SALYER,

called as a witness, having been duly sworn according to law, testified as follows:

DIRECT EXAMINATION

BY MR. COOK:

Q. Would you state your name and occupation?

A. Ellis Salyer. I work for the Department of Public Safety.

Q. How long have you worked there?

A. About fifteen years.

Q. Were you working for the Department of Public Safety on August 11, 1978?

A. Yes, I was.

Q. Did you interview Ricky Tison on that date?

A. Yes, I did.

Q. Approximately what time was that?

A. Approximately seven o'clock in the morning.

Q. And when did you first arrive on the scene?

A. Probably around 5:30.

Q. Where was this at, where did you interview Ricky at?

A. South of Casa Grande on Chuichu Road. I don't know the exact location.

Q. Where were you at when you did the interview? Were you in a car, truck?

A. It was in a sheriff's office vehicle, automobile.

Q. Do you recall who was present?

A. Myself and Agent Sanchez in the front seat, and Ricky in the back seat.

Q. And who read Ricky his rights?

A. Agent Sanchez.

Q. Do you recall which rights he read them, or did he read it off a card?

A. He read it off a card, I believe.

Q. Did you DPS officers use one standard card?

A. Yes, they do.

Q. And do you have your card with you?

A. No, I don't.

Q. Do you recall which rights Ricky was given?

A. The Miranda Rights, Sanchez gave it to him.

Q. Were they the full Miranda Rights?

A. I believe they were, yes.

Q. And did Ricky invoke his rights at any time?

A. No, he didn't.

Q. Did Officer Sanchez ask him if he wanted to talk to you at that time?

A. Yes, he did.

Q. And what was Ricky's response?

A. He just shrugged his shoulders.

Q. And then did he start talking, without telling me the text of what he said, did he then proceed to talk to you?

A. Yes, he did.

Q. At any time during your interview, were any threats or coercion or anything placed on Ricky?

A. No.

Q. Was it daylight at that time?

A. Yes, it was.

Q. Did Ricky have any clothes on?

A. No, he did not.

Q. Did he have a blanket?

A. No, he did not.

Q. At that point in time he didn't have a blanket at all?

A. No, he didn't.

Q. Where was Ricky when you first found him?

A. In the back seat of the sheriff's office car.

Q. So he was already sitting there, and you didn't take him out from anywhere else to transport him over there?

A. No, I didn't.

Q. Do you know if anybody had interviewed him previously?

A. I believe two of the sheriff's deputies had.

Q. Do you know if he talked to them or told them that he didn't want to talk to them?

A. I don't know.

Q. Did you ever see anybody use any type of threat or corercion on Ricky?

A. No, I did not.

Q. How long were you around the area where Ricky was sitting in the car?

A. Oh, from around 6:30 until they departed for Florence.

Q. And what time was that?

A. I would have to guess around eight o'clock.

Q. When you were out there, were there many people around the area where you were doing your interview at?

A. No, just the normal foot traffic back and forth.

Q. Was anybody paying very much attention to you at all or the car that you were sitting in?

A. No.

Q. Do you recall anybody coming up and talking to you or anything during that period of time?

A. No, I don't.

MR. COOK: I don't believe I have any other questions.

BY MR. BEERS:

Q. Officer, what time did you arrive at the scene of the roadblock?

A. I believe it was around 6:30.

Q. Could you tell us approximately how many officers were there at that time?

A. I don't have any idea.

Q. Would it be more than fifty?

A. I don't know.

Q. Could you tell us approximately how many vehicles were out there?

A. There was quite a few vehicles, twenty, twenty-five. I don't know.

Q. Did you notice any blood on Ricky?

A. Yes, I did.

Q. Where was it on his body?

A. On his chest and abdomen.

Q. Did you ask him if he wanted to have a doctor take a look at him?

A. We asked him if he was injured.

Q. Did you ask him?

A. Yes, I did.

Q. Did a doctor examine him prior to your questioning?

A. I don't think so.

Q. Did you ask him if he needed any food or water?

A. Yes, I did.

Q. Did you tape record your interview?

A. No, we did not.

Q. Did you take notes?

A. Yes, we did.

Q. Do you still have your notes?

A. I believe I have them in Phoenix.

Q. Do you normally keep your notes after an interview like this?

A. Yes.

Q. I asked you this earlier, I am not sure I asked you the proper way. Did you arrive out at the scene at 6:30, or did you just first see Ricky at 6:30?

A. I arrived at the scene somewhere between 6:00 and 6:30.

Q. After the sun was starting to come up.

A. Yes, it was light then.

Q. Who was present at the interview where you interviewed Ricky?

A. At first it was myself and Agent Sanchez. Shortly into

the interview Agent Sanchez was called away, and Al Stooks sat in with me.

Q. Did either you or Al Stooks or Agent Sanchez say anything about Donald Tixon during that interview?

A. Probably.

Q. Do you remember substantially what was said? I am not asking you for the exact words, unless you remember them.

A. No. I don't.

Q. Did it concern whether Donald was dead or alive?

A. It could have, yes.

Q. Well, try to remember it. Did it concern Donald?

A. Just going from memory, it could have been in the conversation, that is all I can remember.

Q. I am not trying to trick you, I am just trying to find out roughly what was said about Donald, what the context of it was.

A. I just -- I don't remember.

Q. Do you know why it took so long to take Micky back to Florence?

A. No, I don't.

MR. BEERS: I have no further questions.

REDIRECT EXAMINATION

BY MR. COOK:

Q. You said that you asked him if he wanted to see a doctor. What was his response?

A. He said he wasn't hurt.

Q. You asked him if he wanted any food or water; what was his response?

A. I offered to get him some coffee and a sandwich, and he refused.

MR. COOK: I have no other questions.

MR. EBERS: No further questions.

THE COURT: Thank you. You may step down.

MR. COOK: We would ask that this witness be excused.

THE COURT: No objection?

MR. EBERS: No objection.

THE COURT: You may be excused. Thank you, Mr. Salyer.

MR. COOK: At this time we call Tom Brawley.

TOM BRAWLEY,

called as a witness, having been first duly sworn according to law, testified as follows:

DIRECT EXAMINATION

BY MR. COOK:

Q. Would you state your name and occupation, please?

A. Tom Brawley. I am a detective lieutenant for the Pima County Sheriff's Office.

Q. Were you working in that position on August 11, 1973?

A. On August 11 I was assigned to the Arizona Investigative

Team.

Q. And what were your responsibilities at that time then?

A. I was supervisor of the team.

Q. On that date, did you have occasion to interview Ricky Tison?

A. Yes, I did.

Q. And where was the interview? Where did that take place?

A. It took place in the Pinal County Jail.

Q. Do you recall approximately what time that was?

A. About 12:45.

Q. And what were the circumstances surrounding your interview? Where did you interview him?

A. He was in a cell, beside a cell block.

Q. Was he awake when you did the interview?

A. Yes.

Q. Was he awake when you arrived?

A. Yes.

Q. What was his physical condition at that time?

A. I asked him if he was all right, and he said that he was.

Q. Did he appear to be alert, or did he appear drowsy?

A. No, he appeared to be alert.

Q. And did you notice anything unusual about his actions?

A. No.

(Mr. Bagnall then entered the court room.)

BY MR. COOK:

Q. What was he wearing at that time?

A. He wasn't wearing anything at that time.

Q. Did he have any blanket or anything else with him?

A. No.

Q. Can you describe how his physical appearance was?

A. Well, he looked all right to me.

Q. When you started your interview, what took place?

A. Well, first I introduced myself and Juan Young from the Department of Public Safety, and then I read him his rights.

Q. How did you read him his rights? Was that off the card or memory?

A. No, I read them to him off a standard form.

Q. Do you have that card with you today?

A. I didn't do it off a card, I did it off the printed form that contains a waiver, also.

Q. Okay. Did he sign the waiver?

A. No.

Q. What rights did you read him off that? Do you recall what they are?

A. That he had the right to remain silent, that anything he said could be used against him in a court of law, that he had the right to have an attorney, and if he couldn't afford an attorney we would get one for him, one appointed for him.

Q. At that point in time did you ask him if he understood those rights?

A. Yes.

Q. What was his response?

A. He stated that he did understand them. However, he didn't want to sign the waiver.

Q. What did you do at that time?

A. He told us that he didn't want to make a statement, and I told him that was fine, but there were some things that I would like to see if he wanted to talk about.

Q. What did he say?

A. Well, he went ahead and talked about some things.

A. So he went ahead and took over from there without asking any questions, or did you ask him another question after that?

A. Well, I made a statement that there was still some people missing and I would like to clear that up, and from that point on he started.

Q. Did he, without going into the text of the statements themselves, did he ever try to invoke his rights or state that he did not want to talk with you any further?

A. No.

Q. What caused the interview to terminate?

A. Well, it terminated after we had briefly gone through some things, and I had some answers, and there was

nothing more to be said, so it was just terminated.

Q. So you initiated the termination?

A. Yes, I think I did.

Q. Who else was in the area at the period of time of the interview?

A. Myself and Young.

Q. Did you see any other officers around?

A. No.

Q. Were there any coercion or threats used to get Ricky to talk to you?

A. No.

Q. Did you ask him if he had seen a doctor?

A. I believe I did ask him that initially, and then I was asking him if he was all right and he said that he was.

MR. COOK: I don't have any other questions then, Your Honor.

CROSS EXAMINATION

BY MR. BEERS:

Q. Did Ricky have any clothes on at this time?

A. No.

Q. Did he have a blanket or anything?

A. No.

Q. Did you tape record this interview?

A. No, I didn't.

Q. Did you take notes?

A. Pardon me?

Q. Did you take notes?

A. Yes, some.

Q. Do you still have the notes?

A. I believe they are in the files, I am not sure.

Q. Do you normally keep notes like this after an interview?

A. Yes.

Q. Do you normally interview your interviewees when they are nude?

A. I interview the interviewee however he is whenever I can talk to him.

Q. Did you ask him if he wanted to put some clothes on?

A. No, I didn't.

Q. Did he have any blood on him?

A. Yes.

Q. A lot of blood, a little blood?

A. Oh, I just noticed some dried blood on him.

Q. Did you ask him if he wanted to get cleaned up?

A. No.

Q. You were not at the scene of the roadblock, were you?

A. No, I wasn't.

Q. Did you notice that he had all ready talked to other officers?

A. At the time probably I did.

Q. Did you make a report that consisted of the substance of

the statement?

A. Yes.

Q. Do you know if Mr. Young made the same type of report?

A. No, he didn't. We made the report together.

Q. And you both signed it, I presume?

A. Yes.

Q. You testified that Ricky refused to sign the waiver. What does the waiver say?

A. Not verbatim, but the waiver simply says that he has been advised of his rights, he understands what they are, and that he is willing to make a statement, to give up the right to an attorney.

Q. And he refused to sign that?

A. Yes.

Q. Didn't that give you some indication that maybe he didn't understand his rights or maybe he wasn't really ready to waive them?

A. No, I didn't get that feeling at all.

MR. BEERS: No further questions.

REDIRECT EXAMINATION

BY MR. COOK:

Q. Is it unusual for someone to refuse to sign the statement yet go ahead with an interview?

MR. BEERS: I will object. There is not enough foundation for that question.

THE COURT: Sustained.

MR. COOK: I have no other questions.

May this witness be excused, Your Honor?

THE COURT: I assume so.

MR. BEERS: No objection.

THE COURT: Thank you. You may be excused.

MR. COOK: We have no other witnesses, Your Honor.

THE COURT: Okay. Mr. Beers?

MR. BEERS: Your Honor I move to suppress all three of the statements that Ricky allegedly made.

The basis of my motion is that the statements were not voluntary. I am not alleging that anybody -- I have no further witnesses, I will go on into my argument.

I am not alleging that anybody held a gun to Ricky's head and said "talk, or else," but I am claiming that the totality of circumstances of which the statements were taken were so intimidating that no normal person would have had enough nerve to invoke his right to remain silent.

There were hundreds of officers out there. These boys had just had their clothes forcibly cut off of them with a knife. They were being held totally nude and had been held nude for quite some time. They were being held out in the middle of the desert for no apparent reason. They were arrested at approximately three o'clock and were held until approximately seven o'clock. Nobody testified as to why they

were held so long, but the coincidence of the times indicates to me, at least, that they were held till they talked. As soon as Mr. Salyer finished his interview with Ricky, they were transferred back to Florence at seven o'clock.

I think that this type of feeling, these types of vibrations from the various police officers will surely come across to anyone that was being questioned by them, particularly when the person is held without any clothes, covered with blood, not knowing for certain the status of his wounded brother. Now, one of the men testified that Officer Martinez said we will take you to see Don. I don't know exactly what that means, but it could be taken to mean that is what happened to your brother, if you don't want to talk to us, you don't have to, but --

I think when you look at every circumstance, hundreds of officers, held in the desert, the situation with Donald, the fact that none of these interviews were even tape recorded, there might be some confusion as to what was actually said, that argument applies primarily to the statement that was taken at 5:30. The statement at 6:30, again there was some talk of Donald, Ricky was still nude, still had blood on him, the officer that took that interview doesn't seem to remember much of anything else regarding any of the circumstances of the interview, and finally the statement at 12:45 back at the jail, Ricky has still not been

given any clothes, he has still got blood all over him, and most importantly at this statement he refused to sign that waiver.

Now, he orally said he understood the rights and waived them, but the action of refusing to sign that waiver indicates that he either did not understand the rights or he wasn't ready to waive them.

Most laymen are brought up in the assumption that when legal matters are involved, everything has to be in writing, and I strongly suspect that his refusal to sign that waiver indicated that he was not ready to waive those rights, and I do know that under the law when all the circumstances are looked at, the statement is not really voluntary, and it should be suppressed, and I think that is the case with all three of Ricky's statements.

THE COURT: All right. Mr. Pagnell?

MR. PAGNALL: Do you want to respond to them first?

MR. COOK: Go ahead, and I will respond to both of them.

MR. PAGNALL: If it please the court, basically the intimidation indicated by Mr. Beers has, I think, to borrow a phrase from him, the totality of the circumstances where the men were -- the circumstances under which they were

being held even having had their clothes ripped off, and in a situation where there were over a hundred officers, all of them armed, in the area, there was no apparent -- anyone else that if they had wanted to turn to somebody for advise or to say "let me talk to somebody about this thing," there was nobody there. They were in an area where they were totally covered on all sides by police officers and actually a person wouldn't have had to have anything said to him to intimidate him. He was physically intimidated just by the circumstances that existed at the time.

On that basis, I ask that the statements made by Raymond as evidenced to the officers that testified this morning, that they be suppressed also.

MR. COOK: Your Honor, the statements as they were given are voluntary. They were made in an area where there were many officers around, but that is no different than being in a police station where there are also many officers around. Most of the officers were not paying any attention to the car, to the interviews, they were traveling back and forth. Gary Tison was still on the loose, and the main purpose that the officers were involved in was that of finding Gary Tison.

All of the people were read their Miranda Rights, they all voluntarily talked, they made their statements not once, but three different times, and a couple of them in one

car, and then clear back at the station afterwards when they did finally come back to the Sheriff's Office. They were offered a blanket, they were offered food. They were all checked out to see if they had any problems, if they needed a doctor. There has been no evidence here to the contrary other than the fact that they were treated fairly well under the circumstances. There have been no evidence of any threats or that anybody used violence on them.

Tom Tolis picked them up from when they were captured and brought them on up. He was with them at all times, but each of the officers when asked if they observed any threats or coercion used against them indicated that they hadn't seen any. No one had contradicted that.

The location, itself, simply can't be considered as that coercive enough to suppress a statement when all other indications are that it is voluntary. It is out in the desert and it is late, but so are statements which are given in an interrogation room in the police department or sheriff's office.

As to their physical appearance and whether or not they were injured from the accident, apparently they weren't. They all appeared to be alert, they were coherent, they indicated that they knew what the rights were and then they proceeded to talk and made the statements after each of them were read the Miranda Rights in full.

There simply hasn't been any testimony or any evidence to the contrary that the statements should be suppressed.

THE COURT: Any final remarks?

MR. BERNS: I have nothing further to add to what I said before.

MR. BAGBALL: I have nothing further, Your Honor.

THE COURT: Gentlemen, based upon the state of the record, the court in all candor would have to find that the statements made by the defendants, Ricky Tison and Raymond Tison, on August 11 to law enforcement personnel were freely and voluntarily made. I think they understood their rights and they waived them.

I have also had a motion to suppress pending for Mr. Greenawalt.

MR. BROWN: Yes, Your Honor.

THE COURT: And I again have read Mr. Brawley's deposition. Was there anything else on that particular motion?

MR. BROWN: Your Honor, my understanding was that there were to be no more arguments. I would not object to arguments at this time, but Mr. Irwin is not here to respond. It would probably be impropriety.

THE COURT: It was my understanding that it would be submitted upon receipt of Mr. Brawley's deposition. I

have reviewed that. I have reviewed my notes, and the witnesses who testified.

At this time I will make a finding that the statements made by the defendant Greenawalt on August 11 to law enforcement personnel both at the scene of the arrest and here at the Final County Jail were made freely and voluntarily. I think he understood and waived his constitutional rights.

With those findings, gentlemen, do you have anything else to discuss this afternoon?

MR. BROWN: Your Honor, as to that ruling the court just made, my understanding is that that ruling is made in the Yuma County case, or is it made in this one also?

THE COURT: It is my understanding, gentlemen, I believe the stipulation in open court that the state intended to use no statements of Mr. Greenawalt in this case, but it was also my understanding prior to hearing this motion that my findings would be binding in both this case and the Yuma County case.

MR. BROWN: Right.

THE COURT: One other matter I have gentlemen, very frankly, at least I assume the state has or will, the defendant has submitted requested voir dire questions for the court to ask the jury panel, or perhaps if I permit it the attorneys themselves. Have you filed yours?

MR. COOK: I haven't submitted a copy of the questions. No, Your Honor.

THE COURT: The more important matter is if in fact we use a written questionaire to be filled out by the jury, I would ask you gentlemen to get together and prepare one comprehensive questionnire sheet. I don't think I should give them two questionaire sheets, and I believe that if you gentlemen would get together and prepare that I will consider letting the prospective jurors fill it out. Do you see any problems there?

MR. COOK: Your Honor, we have discussed it at least one time, and then we both went back and prepared one of our own, and they do differ. If you would be available this afternoon so we can come in and let you do a little arbitration, take a few of them out or let them in, I think that would be helpful.

THE COURT: Why don't you both bring your questionaire sheets in chambers and we will go over them, and I will indicate which ones I will hear.

MR. DEERS: There is one more thing, Your Honor.

THE COURT: All right.

MR. DEERS: There was at least one other witness out in the prison that we need a Dessuresult Hearing on. Due to some confusion between me and Mr. Cook, we called the wrong guy over. We agreed that if a Dessuresult Hearing on

any other witness is necessary, we can do it on the morning before he testifies.

THE COURT: I will trust you gentlemen to see that we do that before the witness is called.

MR. BERNS: Yes, Your Honor.

MR. COOK: There is a statement also from a young lady who was at the Yuma County Jail, and we didn't bring her up there for the same reasons. I have talked to Mr. Bagnall, and if we need to we will make a determination at that time. At this point in time the state is not even sure we are going to call her as a witness.

MR. BAGNALL: That is true.

THE COURT: Also, if you wish to use any of the statements we have just discussed today, Mr. Cook, we obviously have to go over them and see what portions should be excised.

MR. COOK: That's correct, Your Honor.

THE COURT: So do you want to do that this afternoon, or what?

MR. BROWN: Your Honor, I might inform the court, Mr. Moorehouse was just in here. I am due to finish a preliminary hearing in Casa Grande at three o'clock, or as soon as we can get there afterwards, we are trying to get that done before we start into this other so that person won't be held without a determination of probable cause while

this is going on. It could be Mr. Cook and I could get together on the questionaires, something like that. We are both reasonable people with the court indicating something of what they wanted. I think we can probably resolve the issues.

THE COURT: Yes, I think you both can work out a question, give a little and take a little.

MR. COOK: As to the statements, also, I think we can do that one evening after jury voir dire which will take several days, I am sure.

THE COURT: Okay. As far as we are concerned, we will have the jury here at 9:30 in the morning, gentlemen, and I understand arrangements have been made for your clients to be here prior to that time.

MR. BROWN: Somewhat before that.

THE COURT: I will see you all tomorrow.

(Court was then recessed.)

I HEREBY CERTIFY that I made a stenotype record of the proceedings had in the foregoing matter; that the said stenotype record is full, true and accurate; and that the foregoing 81 pages constitute a full, true and accurate transcript of the same to the best of my skill and ability.

STANLEY J. URBAN, JR.
OFFICIAL COURT REPORTER

EXHIBIT M

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YUMA

STATE OF ARIZONA, Plaintiff, vs. RICKY WAYNE TISON, Defendant.	NO. 9299

Yuma, Arizona

BEFORE: THE HONORABLE DOUGLAS W. KEDDIE
Judge of the Superior Court
Division Three, Yuma, Arizona

VOLUME FIVE

good character together with all the other evidence. If you are convinced beyond a reasonable doubt that the defendant is guilty of the crime charged you must not use evidence of good character as an excuse to acquit the defendant.

Running away or hiding after a crime has been committed does not in itself prove guilt. You may consider any evidence of the defendant running away or hiding together with all the other evidence.

If you determine that the defendant possessed property recently stolen from the individual that is one circumstance you may consider in reaching your verdict; however, this circumstance alone is not enough to permit you to find the defendant guilty.

All persons concerned in the commission of an offense whether they directly commit the act constituting the offense or aid and abet in its commission though not present are responsible for the commission of the offense.

Circumstantial evidence is the proof of fact or circumstances which give rise to a reasonable inference of other facts which tend to show the guilt or innocence of a defendant. Circumstantial evidence should be considered by you together with all the other evidence in the case in arriving at a verdict.

A conspiracy is an agreement between two or more persons to commit a public offense or crime. One may become a member of a conspiracy without

full knowledge of all the details of the conspiracy. On the other hand a person who has knowledge of a conspiracy, but happens to act in a way that furthers the object or some of the conspiracy does not thereby become a conspirator. Before you may find that the defendant or any other person has become a member of a conspiracy the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed and that the defendant or other person who has claimed to have been a member wilfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

To act or participate wilfully means to act or participate voluntarily and intentionally and with specific intent to do something the law forbids or with specific intent to fail to do something the law requires to be done; that is to say, to act or participate with the bad purpose either to disobey or to disregard the law. So if a defendant or any other person with the understanding of the unlawful character of the plan knowingly encourages, advises, or assists for the purpose of furthering the undertaking or scheme he thereby becomes a wilful participant conspirator. One who wilfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

In determining whether a conspiracy existed you should consider the actions and

declarations of all the alleged participants. It is not necessary in proving a conspiracy to show a meeting of the alleged conspirators or the making of an express or formal agreement. The formation and existence of a conspiracy may be inferred from all circumstances tending to show the common intent and may be proved in the same way as any other facts may be proved by either direct testimony of the fact or by circumstantial evidence or by both direct and circumstantial evidence.

The acts and statements of a conspirator when said or done in furtherance of the conspiracy and during its continuance are binding on all participants in the conspiracy; however, the acts and statements of the conspirator are not binding on other participants in the conspiracy if they occur after the object of the conspiracy has been consumated.

A person who conspires with others to escape from legal custody, to avoid or prevent lawful arrest, to perpetrate or to attempt to perpetrate robbery or kidnap is responsible for the acts later committed by co-conspirators as a part of and during the conspiracy.

Theft of a motor vehicle is committed by taking from another a motor vehicle with the intent to deprive the owner of possession. Such intent may be to permanently deprive the owner of possession or to temporarily deprive the owner of possession. If you determine that the defendant took the motor vehicle from

EXHIBIT N

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YUMA

STATE OF ARIZONA,
Plaintiff,
vs.
RAYMOND CURTIS TISON,
Defendant.

NO. 9299

Yuma, Arizona

BEFORE: THE HONORABLE DOUGLAS W. KEDDIE
Judge of the Superior Court
Division Three, Yuma, Arizona.

VOLUME THREE

SUPERIOR COURT
YUMA, ARIZONA

inferences from the facts brought out in evidence: however, if an inference which you might make is based upon an underlying inference which you have made from the facts, then the first inference must be established to the exclusion of any other reasonable theory rather than being a probability before you may make the second inference.

A conspiracy is an agreement between two or more persons to commit a public offense or crime. One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand a person who has knowledge of a conspiracy, but happens to act in a way that furthers some object or the purpose for the conspiracy does not thereby become a conspirator.

Before you may find that the defendant or any other person has become a member of a conspiracy the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed and that the defendant or other person who was claimed to have been a member wilfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

To act or participate wilfully means to act or participate voluntarily and intentionally and with specific intent to do something the law forbids or with specific intent to fail to do something the law requires to be done. That is to say, to act or participate with the bad purpose to either disobey or to

disregard the law, so if a defendant or any other person with the understanding of the unlawful character of a plan knowingly encourages, advises, or assists for the purpose of furthering the undertaking or scheme he thereby becomes a wilful participant conspirator.

One who wilfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

In determining whether a conspiracy existed you should consider the actions and declarations of all the alleged participants. It is not necessary in proving a conspiracy to show a meeting of alleged conspirators or the making of an express or formal agreement.

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Theft of a motor vehicle is committed by taking from another a motor vehicle with the intent to deprive the other of possession. Such intent may be to permanently deprive the other of possession or to temporarily deprive the other of possession. If you determine that the defendant took a motor vehicle from another you must then determine whether he meant to temporarily or permanently deprive the person of its possession. If you find the defendant intended only to deprive the person of its possession temporarily you must find the defendant not guilty of the theft of a motor vehicle with the intent to deprive the owner of its possession permanently.

Armed robbery is the taking of personal property in the possession of another from his person or immediate presence and against his will accomplished by means of force or fear with a gun or deadly weapon.

A person who seizes, confines, inveigles, entices, decoys, abducts, conceals, or carries away an individual by any means whatsoever with the intent to hold or detain or who holds or detains any individual for ransom, reward, pecuniary benefit, or otherwise or as

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NO. 81-5634

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

RICKY WAYNE TISON and
RAYMOND CURTIS TISON,

Petitioners,

v.

STATE OF ARIZONA,

Respondent.

RESPONSE TO THE ORIGINAL and CONTINUED JOINT PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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NOTE:

Essentially identical evidence was introduced at the separate trials of the two Petitioners. Unless otherwise designated, all transcript references are to the trial of Ricky Tison.

REASONS FOR DENYING THE WRIT

I. THIS COURT'S DECISION IN LOCKETT v. OHIO LEAVES NO DOUBT THAT THE DEATH PENALTY CAN BE CONSTITUTIONALLY APPLIED TO A NON-TRIGGERMAN, SO LONG AS HIS DEGREE OF PARTICIPATION IN THE CRIME HAS BEEN CONSIDERED, AND PETITIONERS' INVOLVEMENT IN THE DEATHS OF THE FOUR MEMBERS OF THE LYONS FAMILY WAS SO DEEP AND GROSS THAT THEY WERE PROPERLY SENTENCED TO DEATH.

In approaching the death penalty issue Petitioners have set the stage with a substantially erroneous summary of the case, that "It is undisputed that they did not fire the fatal shots, intend the fatal results, or control the fatal events". (Original Petition at 15.) In fact, all three of those propositions have been heavily disputed. To begin with, the only direct "evidence" of who fired the fatal shots was from Petitioners themselves, hardly an unbiased source. Nothing would be less surprising than to discover two young murderers seeking to lay the blame on Gary Tison (who, though their father, was already dead and had been previously convicted of a murder committed in the course of an escape) and Randy Greenawalt (a convicted double murderer whom nobody would believe). The victims were killed by blasts from two shotguns, one of them a 16 gauge. A firearms expert from the F.B.I. testified that the 16 gauge shells at the death scene bore markings consistent with having been fired from a gun marked as Exhibit 24. (R.T. Vol. V at 524-525.) Exhibit 24 was a weapon Ricky Tison had left with one Charles Whittington, a gunsmith, for purposes of having it shortened, and later retrieved. (R.T. Vol. I at 112-113.) Also interesting was the presence by the death car of two expended .45 shells Exhibit 52A, (Vol. II at 206.) They were fired,to an absolute certainty, from Ricky Tison's single-action Colt revolver (Exhibit 29), which he had bought from Whittington. (Vol. V at 528.) Ricky obviously set great store by this pistol, for he took it with him when he ran half-clothed from the wrecked van. (Vol. II at 328-29, 331-33.) Though the resting place

of the slugs from the .45 is not shown in the record, the presence of the spent cartridges from Ricky's personal handgun at the crime scene is strongly suggestive of active participation in the events there. This gun is particularly important, because Ricky Tison was concerned enough to lie about it. He admitted being armed with it during the Lyons episode. (Summary of Jan. 26, 1979 statement, attached to Presentence Report, at 1.) He claimed it was never fired:

> Q. Okay. Was there any other weapon fired out there except those two shotguns?
>
> A. No. They were the only two shot.
>
> (Transcript of Brown interview at 47.)

Yet we know it was fired there, because of the expended cartridges found at the scene.

Second, Petitioners' claimed lack of intent that people should die has never been conceded, and is clearly negated by the evidence. Several examples will suffice. Both brothers indisputably cooperated in a conspiracy to break two known murderers out of prison. To do so, they utilized sawed-off shotguns and a pistol with a silencer; a silencer has no purpose other than to make killing easier by concealing the noise generated by shooting. Ricky spoke to his brother after their capture about a .45 automatic: "He said he lost the pistol when the van went out of control and he didn't get a chance to use it." (R.T. Vol. III at 484.) A psychological report prepared in anticipation of sentencing indicates that Ricky went into the affair expecting that a "shoot-out" would be necessary eventually. (MacDonald report, attached to Presentence Report, at 5-6.) The situation was similar with Raymond Tison. He stated to the Probation Officer that the guns used in the prison break were loaded, and that he realized people might be killed; he would even have been willing to personally kill in a "very close life or death" situation. (Presentence Report at 11.) Thus, even if they did not speci-

fically plot to do away with the Lyons family, both Petitioners were intent from the outset on killing people, if that seemed necessary for their purposes.

Third, it staggers the imagination to see it claimed that Petitioners did not control the fatal events. The murders would never have taken place had they not engineered the escape. More directly, even accepting their self-serving version of events, both Petitioners were in a position to influence the situation. Ricky Tison admitted that his father had specifically told him, before doing anything, that he was "really thinking" about killing the helpless, unarmed, isolated family, and that although he was himself heavily armed, he did absolutely nothing to deter or dissuade his father from doing it. (Transcript of Brown interview, Feb. 1, 1979, at 33.) Raymond Tison made a similar admission. (Interview, Jan. 26, 1979.)

Thus, there was substantial evidence of Petitioners' deep participation in the events which were the predicate to the killings, without convincing rebuttal, their murderous intent, and their influence over the whole situation. Any fair reading of the opinions (Exhibits A and B to the Petition) shows that the Arizona Supreme Court did not accept Petitioners' position on these matters, but rather held that even if Petitioners were right, it would not relieve them of culpability. These factors are important because they demonstrate significant distinctions between thise case and the two cases Petitioners primarily rely on, Lockett v. Ohio, 438 U.S. 586 (1978), and Enmund v. Florida, 399 So.2d 1362 (1981), cert. granted, No. 81-5321. Lockett involved an accidental killing in the course of a robbery, out of the presence of the defendant, (438 U.S. at 590), so it factually is not comparable to the carefully crafted conspiracy and prison break presented here. Moreover, the whole point in Lockett was that Ohio did not permit minimal participation to be treated as mitigation; Arizona has specifically allowed such consideration since 1973, and Petitioners were both given the

benefit of it. Enmund is also different, in that there was no evidence of the sort of preconcert and willingness to see death occur which was obvious in this case, Enmund apparently was not present when the killings occurred, and Enmund's cohorts were not identified as being convicted murderers whom he had brokenout of prison. The prior history of the persons a defendant associates himself with is of great importance; while Petitioners indicate their willingness to explore "the Anglo-American history of the felony murder and aiding and abetting rules" (Petition at 16), far older precedent has resolved the question of their culpability against them on precisely this basis:

> "And if an ox gores a man or a woman to death, the ox shall surely be stoned and its flesh shall not be eaten; but the owner of the ox shall go unpunished.
>
> "If, however, an ox was previously in the habit of goring, and its owner has been warned, yet he does not confine it, and it kills a man or a woman, the ox shall be stoned and its owner also shall be put to death.
>
> Exodus 21:28-29.

Having intentionally set loose murderers, Petitioners may not be heard to claim they are guiltless when more deaths are perpetrated.

Turning from essentially factual considerations to legal arguments, we see that Petitioners have raised several. First, they claim that they were not given individualized sentencing consideration, because the judge simply treated them like "the actual killers". (Petition at 16-17.) As we have already noted, there is some basis for believing that Petitioners are the "actual killers", but in any event the trial judge did given them individualized consideration. The result of that individualized consideration was a finding of involvement so deep as to warrant punishment identical to that of the "actual" triggerman (if that was someone else). The trial judge's findings include the following:

3. Neither defendant's participation was relatively minor. Although each of the defendants has stated the murders were actually committed by Gary Tison and Randy Greenawalt, the participation of each in the crimes giving rise to the application of the felony murder rule in this case was very substantial. Even accepting as true their statements of who actually fired the fatal shots, it cannot be said that their participation was relatively minor. By their own statements their participation up to the moment of the firing of the fatal shots was substantially the same as that of Randy Greenawalt and Gary Tison. At the moment of the firing their participation may not have equalled that of Randy Greenawalt and Gary Tison, but their standing and watching them while armed themselves cannot be characterized as relatively minor participation.

4. Each defendant could reasonably have foreseen that his conduct in the course of the commission of the offenses for which he was convicted would cause or create a grave risk of causing death to another person.

There are mitigating circumstances present. They are:

1. The youth of the defendants, Ricky being 20 years of age and Raymond being 19 years of age.

2. The defendants have no prior felony convictions and their criminal activity before July 30, 1978 was very minimal.

3. They have been convicted of four murders under the felony murder instructions.

* * *

Number 7. In determining what punishment should be imposed for your convictions of murder of John F. Lyons, Donnelda Lyons, Christopher Lyons and Teresa Jo Marie Tyson, this Court has weighed the aggravating circumstances and the mitigating circumstances set forth in its special verdict. This Court finds that there are no mitigating circumstances sufficiently substantial to call for leniency. Therefore each of you is sentenced to death on each of the murders of which you have been found guilty...

(Exhibit C to the Original Petition at pp. 63a-64a, 69a.)

Petitioners were given all the individualized consideration to which they were entitled.

Next, Petitioners suggest that "the Constitution requires the State to bear the burden of establishing that

the defendant's role in the crime was sufficiently great to warrant the death penalty". (Petition at 17.) Arizona has never contended otherwise, but what Petitioners fail to understand is that that burden is met once even one of the statutory aggravating circumstances is proved. Absent substantial mitigation, one aggravating circumstance will provide the difference between the charged crime and the "norm" of murders so that death may appropriately be imposed. See, e.g., State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976), cert. denied 433 U.S. 915 (1977). What Petitioners are really complaining of is the rule that it is up to the defense to provide the evidence of mitigation, which may offset the aggravating circumstance so that the death penalty is not appropriate. The Arizona Supreme Court, relying on a decision of this Court, has repeatedly rejected the argument Petitioners now raise. See, e.g., State v. Watson, 120 Ariz. 441, 447, 586 P.2d 1253, 1259 (1978), cert. denied 440 U.S. 924:

> When the issue of guilt is settled and only the question of punishment remains, due process is not offended by requiring the already guilty defendant to carry the burden of showing why he should receive leniency. This is not contrary to the due process requirement that the State has the burden of proof as to guilt of the defendant. In discussing affirmative defenses when sanity was a question, the United States Supreme Court stated:
>
> "Among other things, it is 'normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so deeply rooted in the traditions and conscience of our people as to be ranked as fundamental'. (citations omitted)" Patterson v. New York, 432 U.S. 197, 201-02, 97 S.Ct. 2319, 2322 53 L.Ed 2d 281, 286-87 (1977).
>
> To require the State to negate evey mitigating circumstance would place an impermissible burden on the State. We do not believe it offends due process to require the defendant to show such mitigating circumstances.

Finally, Petitioners raise the question of the "proportionality" of the death penalty for a crime where guilt is established by means of some form of vicarious responsibility rule. Most of the cases they cite are not even relevent. Coker v. Georgia, 433 U.S. 584 (1977) involved the death penalty for rape, not homicide. In Gregg v. Georgia, 428 U.S. 153 (1976) the defendant's direct causation of the death was clear, so the felony murder question was not addressed, and Green v. Georgia, 442 U.S. 95 (1979), was only a question of evidence admissibility, not what effect that evidence (supposedly exculpatory statements by the "real" perpetrator) should have had. The only case from this Court directly examining the "proportionality" concept is Lockett v. Ohio, supra, and the various decisions in that case indicate that Petitioners' death sentences are not constitutionally "disproportionate".

It is true that Justice White held in his dissent that death was a disproportionately severe punishment "without a finding that the defendant possessed a purpose to cause the death of the victim." 438 U.S. at 624. In doing so he stood alone. Justice Marshall continued to adhere to his view that the death penalty is always constitutionally prohibited. 438 U.S. at 619. Presumably he would be joined in this by Justice Brennan, who did not participate in the decision.

A six member majority of the court refused to hold that execution could never be imposed for felony murder. Justice Rehnquist flatly rejected the results of Justice White's proportionality analysis:

> As my Brother WHITE concedes, approximately half of the States 'have not legislatively foreclosed the possibility of imposing the death penalty upon one who did not intend to cause death.' . . .Centuries of common-law doctrine establishing the felony-murder doctrine,

> dealing with the relationship between aiders and abettors and principals would have to be rejected to adopt this view. Just as surely as many thoughtful moralists and penologists would reject the Biblical notion of 'an eye for an eye, a tooth for a tooth,' as a guide for minimum sentencing, there is nothing in the prohibition against cruel and unusual punishments contained in the Eighth Amendment which sets that injunction as a limitation on the maximum sentence which society may impose.
>
> 438 U.S. at 635-36.

The plurality opinion, authored by Chief Justice Burger and joined in by Justices Stewart, Powell, and Stevens, emphasized that the felony-murder doctrine itself was constitutionally inoffensive:

> That states have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony murder statutes is beyond constitutional challenge.
>
> 438 U.S. at 602.

They did hold that degree of participation in the crime had to be considered in assessing punishment, but nowhere in the opinion is there any suggestion that death may not be appropriate, even for a felony-murder, if the mitigating effect of minimal participation or lack of specific murderous intent is out-weighed by sufficiently cogent aggravating factors.

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.
>
> 438 U.S.at 604.
> (emphasis original, footnotes omitted).
>
> [A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense

> proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.
>
> 438 U.S. at 605. (Emphasis added.)

Justice Blackmun likewise rejected any absolute prohibition on the use of the death penalty based upon proportionality analysis:

> The Ohio capital statute, together with that State's aiding and abetting statute, and its statutory definition of 'purposefulness' as including reckless endangerment, allow for a particularly harsh application of the death penalty to any defendant who has aided or abetted the commission of an armed robbery in the course of which a person is killed, even though accidentally. It might be that to inflict the death penalty in some such situations would skirt the limits of the Eighth Amendment proscription, incorporated in the Fourteenth Amendment, against gross disproportionality, but I doubt that the Court, in regard to murder, could easily define a convincing bright-line rule such as was used in regard to rape, Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 282 (1977), to make workable a disproportionality approach.
>
> 431 U.S. at 613-14.
> (emphasis added, footnotes omitted).

Instead, he too would have the circumstances of the crime weighed in mitigation, the outcome to be determined by the cumulative impact of all the factors, both mitigating and aggravating, relevant to sentencing:

> The more manageable alternative, in my view, is to follow a proceduralist tack, and require, as Ohio does not, in the case of a nontriggerman such as Lockett, that the sentencing authority have discretion to consider the degree of the defendant's participation in the acts leading to the homicide and the character of the defendant's mens rea. That approach does not interfere with the State's individual statutory categories for assessing legal liability but merely requires that the sentencing authority be permitted to weigh any available evidence, adduced at trial or at the sentencing hearing, concerning

> the defendant's degree of participation in the homicide and the nature of his mens rea in regard to the commission of the homicidal act. A defendant would be permitted to adduce evidence, if any be available, that he had little or no reason to anticipate that a gun would be fired, or that he played only a minor part in the course of events leading to the use of fatal force.
>
> 438 U.S. at 615-16.

It therefore appears that while degree of participation and other circumstances of the crime must be taken into account as mitigating factors, the existence of such factors does not dictate that capital punishment may never be imposed. Such circumstances must simply be added to the sentencing calculus, the outcome being determined by the impact of all sanction-relevant variables. This is precisely what has been required in Arizona since enactment of the current capital punishment scheme. Ariz. Rev. Stat. Ann. §§13-454 (F)(3) and (4), which governed the sentences in this case, provided that the following must be considered as mitigating circumstances:

> 3. He was a principal, under §13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.
>
> 4. He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person.

Petitioners were given the benefit of these provisions, and the trial court also took cognizance that the convictions had been obtained under felony-murder instructions. Thus there can be no question that Petitioners were given every consideration they were entitled to.

A significant number of state courts have concluded that death is not a disproportionate penalty where one is deeply involved in a murder, even if he is not the trigger-man. Besides this case and Enmund v. Florida, see Legare v. State, 243 Ga. 744, 257 S.E.2d 247 (1979); State v. Brewer,

417 N.E.2d 889 (Indiana 1981); Bullock v. State, 391 So.2d 601 (Miss. 1980); Prather v. State, 137 P.2d 249 (Okla. Cr. App. 1943); State v. Andrews, 574 P.2d 709 (Utah 1977). This Court should concur with these courts, and deny the writ in the present case.

II. THE ARIZONA SUPREME COURT CORRECTLY CONCLUDED THAT PETITIONER RICKY TISON'S LAWYER HAD WAIVED ANY ISSUE OF THE ADMISSIBILITY OF PETITIONER'S STATEMENTS UNDER MIRANDA v. ARIZONA, AND THE STATEMENTS WERE SHOWN TO HAVE BEEN VOLUNTARILY MADE, SO THERE IS NO ISSUE REQUIRING ACTION BY THIS COURT.

Petitioner Ricky Tison next raises questions about the admission of certain incriminating statements made by him. He begins by flatly asserting that these statements were bad, because in violation of Edwards v. Arizona, ___ U.S. ___, 68 L.Ed.2d 378 (1981) and Rhode Island v. Innis, 446 U.S. 291 (1980). (Continued Petition at 17.) This contention is not admitted by Respondent; quite aside from the fact that the events and trial in this case long preceded both those decisions, so that they may not even be chronologically applicable, the facts are much closer to those in Michigan v. Mosley, 423 U.S. 96 (1975). There was a total of three statements given, but virtually everything elicited in the two earlier statements (which occurred out in the desert at the scene of the capture) was also included in the later statement, given in the jail to Lt. Brawley. The Brawley statement is a classic Mosley situation, separated substantially by both time and distance from the original questioning, conducted by a different person from a different agency, and preceded by a completely renewed advisement of rights. Therefore, even if Miranda applied, it was complied with, at least in the Brawley statement, and the earlier statements (even if improper in some respect) were superfluous, and harmless error at worst. It is submitted, however, that

the Arizona Supreme Court properly refused to pass on the claimed Miranda violations because they were, indeed, waived, and it is therefore unnecessary for this Court to tediously dissect the facts on the question.

A. Existence of a waiver. Petitioner has admitted that he "presented no written motion or oral argument at the suppression hearing which specifically mentioned the Fifth and Sixth Amendments or Miranda v. Arizona." (Continued Petition at 17.) However, to understand how clearly the defense counsel was asserting pure voluntariness and nothing more, it is essential to read his actual argument, which is reproduced as pages 165a-167a of Exhibit L, attached to the Continued Petition. He began as follows:

> MR. BEERS: Your Honor I move to suppress all three of the statements that Ricky allegedly made.
>
> The basis of my motion is that the statements were not voluntary. I am not alleging that anybody -- I have no further witnesses, I will go on into my argument.
>
> I am not alleging that anybody held a gun to Ricky's head and said "talk, or else," but I am claiming that the totality of circumstances of which the statements were taken were so intimidating that no normal person would have had enough nerve to invoke his right to remain silent.
>
> (Exhibit L, p. 165a; emphasis added.)

He ends on a similar note:

> I do know that under the law when all the circumstances are looked at, the statement is not really voluntary, and it should be suppressed, and I think that is the case with all three of Ricky's statements.
>
> (Id. at 167a; emphasis added.)

This line of argument plainly demonstrates that the defense counsel understood what is shown below, that the Arizona courts have consistently distinguished between compliance with Miranda and the broader concept of voluntariness, and that he framed his argument accordingly. Nowhere in his discussion does he so much as mention Miranda

or the right to counsel. On the contrary, he raises factors which are indisputably outside the realm of Miranda, but which do bear on the traditional concept of voluntariness: numerous police being around, the defendants' clothes being cut off them, their being held nude out in the desert for some time, uncertainty regarding the status of Donnie Tison, etc. Even in discussing the matter of appellant's refusal to sign a rights waiver form the lawyer did not advert to typical Miranda questions like the resumption of questioning after a rights invocation; instead, he argued that the refusal to sign indicated that the statement given was "not really voluntary." It is true that the prosecutor briefly mentioned Miranda in his responsive argument (Exhibit L, pp. 168a, 169a) but the overwhelming bulk of the argument was oriented toward voluntariness generally. Likewise, the trial judge mentioned his belief that both Petitioners had understood and waived their rights, but only as an afterthought to his finding that the statements were "freely and voluntarily made". (Exhibit L. at p. 170a.)

Petitioner would ascribe all of this not to a careful focusing on what the defense counsel really believed to be the state of the facts and a calculated decision as to what he could reasonably argue, but rather to a general confusion in Arizona law about the distinction between Miranda on one hand and "voluntariness" on the other hand. In support of this idea he particularly points to this Court's reversal of the Arizona Supreme Court in Edwards v. Arizona, supra. It is submitted that this Court perceived confusion in Edwards that was not actually there; the Arizona Supreme Court pointed out in State v. Edwards, 122 Ariz. 206, 212, 594 P.2d 72, 78 (1979), that "voluntariness of a confession" was meant to include "the totality of the circumstances", including "whether the defendant's action is knowing and intelligent

and whether his will has been overborne". "Knowing, intelligent, and voluntary" is Miranda phraseology. Nonetheless, this Court treated the case as if voluntariness in the broad sense of the overbearing of the defendant's will was the only factor considered, and reversed. The truth is that Arizona has always distinguished between Miranda compliance and "voluntariness", but the distinction is blurred if the reader of the caselaw fails to recognize that "voluntary" means different things in different contexts. Even before Miranda came along a defendant's statements had to be voluntary to be admissible, in the sense of not being the result of threats, promises, or duress. See, e.g., Kermeen v. State, 17 Ariz. 263, 151 P.738 (1915); State v. Gallagher, 97 Ariz. 1, 396 P.2d 241 (1964). Miranda is based on the theory that custodial interrogation is inherently coercive, so that decision rather artificially added another facet to voluntariness -- the warnings spelled out in Miranda had to be given or the statements would be excluded as "involuntary", regardless of whether there had been any actual threats, promises, etc. Another side of Miranda is that, even if the warnings were properly given (so as to remove the presumption of involuntariness), defendants would sometimes invoke the Miranda rights, and then subsequently make a statement. The law, of course, demands that the waiver of such invoked rights be shown to be knowing, intelligent and voluntary, so yet another variant on the term "voluntary" developed. Thus, "voluntary" has at least two different discernible usages -- in the limited and rather artificial context of Miranda (relating to either the initial warnings or a subsequent waiver), and in the broader context of any sort of improper influence (regardless of whether the warnings have been given). The Arizona courts have consistently maintained the distinction between voluntariness in its broad sense and the

artificial concept of voluntariness set up in Miranda. Examples are:

1. State v. Arnett, 119 Ariz. 38, 46, 579 P.2d 542, 550 (1978) - "Miranda v. Arizona, supra, did not displace the standards of 'voluntariness' established by case law before that decision; whether a confession is voluntary depends on the facts of each case; and compliance with the Miranda decision is only one factor to be considered."

2. State v. Bishop, 118 Ariz. 263, 268, 576 P.2d 122, 127 (1978) - compliance with Miranda and absence of threats, promises, long interrogation, etc. listed separately as factors showing voluntariness.

3. State v. Cabrera, 114 Ariz. 233, 560 P.2d 417 (1977) - statements to private persons must still be free of coercion to be admissible, even though Miranda not applicable.

4. State v. Miller, 110 Ariz. 597, 598, 522 P.2d 23, 24 (1974) - court dealt with appellant's contention that "even if he were properly given the Miranda warnings, the confession was involuntary..."

5. State v. Stone, 122 Ariz. 304, 594 P.2d 558 (Ct. App. 1979) - court need not instruct jury on Miranda in giving them voluntariness issue.

6. State v. Denny, 27 Ariz. App. 354, 555 P.2d 111 (1976) - though Miranda was "scrupulously observed", confession improperly admitted because obtained by trick.

In sum, there is no reason to believe that this was anything other than a knowledgeable decision by counsel to pursue the voluntariness line of argument and waive the other approaches. It is therefore fair to hold Petitioner to his choice of argument and to preclude consideration of objections not clearly raised with the trial court. This is not the first time an Arizona appellate court has refused

to consider an objection to a confession not raised in the trial court. See State v. Winters, 27 Ariz.App. 508, 556 P.2d 809 (1976). That the Attorney General argued the Miranda issues (Continued Petition at 18) means no more than that he responded to the issues as framed first by Petitioner in the appeal and in doing so overlooked the waiver; such appellate level inadvertence cannot transform trial court waiver into a non-waiver. The bottom line is that the trial judge was never put on notice that a detailed Miranda analysis was expected, so none was done, and Petitioner waived the issue.

B. Waiver standard. Petitioner further suggests that the Court should take this case up as an opportunity to establish what kind of conduct is necessary to establish a waiver. It is submitted that such a standard has already been set, and that the record here contains nothing calling out for renewed consideration by this Court. There can be no doubt that the Arizona procedural rule requiring specificity of objections meets legitimate state interests. Its functions are similar to, and complemtary to, the contemporaneous objection rule endorsed by this Court in Henry v. Mississippi, 379 U.S. 443 (1965) -- unless the trial judge understands what the objection is, he cannot respond to it appropriately, and the whole reason for raising objections will be frustrated. Indeed, this Court itself subscribed to the specific objection rule in On Lee v. United States, 343 U.S. 747, fn. 3 (1952). Petitioner has presented no explanation whatever for the failure to raise objection to the admission of his statements on Miranda grounds, let alone "exceptional circumstances", so he cannot complain there was error. Cf. Wainwright v. Sykes, 433 U.S. 72 (1977); Henry v. Mississippi, supra. The record suggests there was a knowing waiver, for several reasons. The lawyer was, after all, competent enough

to make a suppression motion. Further, counsel for codefendant Greenawalt, who had undergone essentially similar treatment, had filed a suppression motion specifically based on Miranda less than two months before this motion was heard (Item 32, State Court Record on Appeal), so Petitioner's counsel (who attended the hearing on it) was certainly aware of Miranda's potential applicability. Even after the prosecutor mentioned Miranda briefly in responding to the argument of Petitioner's counsel, the defense lawyer had nothing to say about it. (Exhibit L to the Continued Petition at 168a-170a.)

Under facts like this a knowing waiver must be found. Cf. Estelle v. Williams, 425 U.S. 501 (1976). While Petitioner seems to find it surprising that a failure to state a particular case or numbered amendment will suffice to preclude relief, such action is in accordance with this Court's own actions. See, e.g., Picard v. Connor, 404 U.S. 270 (1971), where relief was denied under the Equal Protection Clause because a litigant, in invoking the Fourteenth Amendment, argued and relied at the state court level only on the Due Process Clause. As we have seen, it is one thing to say that a statement is involuntary, but it is something altogether different to say that it was obtained in violation of Miranda. Petitioner's counsel knowingly relied only on voluntariness, so he merits no relief.

C. Voluntariness. Finally, Petitioner asks this Court to determine whether his statements were indeed voluntary. (Continued Petition at 17-20.) While the cases he cites indicate that questioning of a prisoner while he is stripped is one factor to be considered, none of them establishes a per se rule equating nudity with involuntariness. On the contrary, one of his cases, Malinski v. New York, 324 U.S. 401 (1945) emphasizes that voluntariness is to be determined by examining

"all the attendant circumstances". 324 U.S. at 404. Malinski is particularly instructive in that because the removal of the suspect's clothing was for a legitimate purpose, to examine for bullet wounds, and he was later given a covering, the stripping was actually accorded little weight. See also United States v. Duvall, 537 F.2d 15 (2d Cir. 1976), cert. denied 426 U.S. 950. The situation was similar with Petitioner. His clothing was initially removed as part of a search, was retained because it had been cut to get it off and with the legitimate object of preserving it as evidence, and he was given a blanket to cover himself with before being questioned. (Exhibit L at 136a, 140a, 144a-145a.) The Malinski confession was held involuntary because it "was the product of fear" of being beaten (324 U.S. at 407), and no similar fear has been proved in Petitioner's case.

The details of the circumstances pertaining to Petitioner's statements were presented to the trial court, which found the statements admissible, and that conclusion was upheld after exhaustive examination by the Arizona Supreme Court. (Exhibit A to the Original Petition at 13a-17a.) This Court has previously held that substantial deference will be given to the findings of the trial court, even on the ultimate question of voluntariness. Haynes v. Washington, 373 U.S. 503, 515-516 (1963). This being so, the only reasoned conclusion available is that Petitioner's statements were voluntary and were properly admitted, so no action by this Court is necessary.

III. THE SUFFICIENCY OF THE INSTRUCTIONS RESTS ON AN INTERPRETATION OF STATE LAW, SO THE QUESTION IS NOT APPROPRIATE FOR REVIEW BY THIS COURT, AND IN ANY EVENT THE CONSPIRACY INSTRUCTIONS WERE ADEQUATE.

Petitioners next complain that the Arizona Supreme Court failed to review the correctness of certain instructions given concerning conspiracy. That is not altogether correct. Though the Arizona court declined to go into whether or not the four formal elements of the crime of conspiracy had been enunciated, it did examine them to determine that they conveyed the substance of the Arizona statute which imposes criminal responsibility on all persons "concerned in" the commission of an offense. (Exhibit A to the Original Petition, pp. 17a-18a; see also State v. Greenawalt, 128 Ariz. 150, 168-170, 624 P.2d 828, 846-848 (1981), cert. denied ___U.S.___, 50 U.S.L.W. 3250, in which the same issue was discussed at length in the context of the trial of Petitioners' codefendant.) The highest court of a state is, of course, the ultimate authority on the meaning and application of state statutes. Mullaney v. Wilbur, 421 U.S. 684 (1975). Petitioners are, therefore, really complaining about a state law matter, not a true federal question, and hence are raising matters outside this Court's authority.

It is plain,moreover, that if a full-scale analysis of the instructions is done, they would be fully adequate to cover even a separate formal charge of conspiracy. It is well established in both Federal and Arizona jurisprudence that instructions must be evaluated in their totality. Cupp v. Naughton, 414 U.S. 141 (1973); State v. Goodsoe, 107 Ariz. 367, 489 P.2d 4 (1971). The instructions on conspiracy cover portions of three pages. (Exhibit M at 177a-179a.) The instruction objected to at trial (Number 17) makes up only the first few lines of these instructions, and includes two of the four elements the Petition lists, agreement and

an illegal objective. (177a, at lines 26-28.) The necessity for a plan is touched upon at 178a, lines 8-12. The term "overt act" is not used in the instructions, but the concept is plainly conveyed in the discussion of the need for someone to "act or participate" in furtherance of the conspiracy (178a at lines 8-26), and the mention that the acts of one conspirator bind the others (179a at lines 10-22). All the elements being covered, the instructions were sufficient, and there is obviously no ground for review by this Court.

IV. THIS COURT ALREADY HAVING DEALT WITH THE LIABILITY OF COCONSPIRATORS IN PINKERTON v. UNITED STATES, THERE IS NO NEED FOR FURTHER EXPLORATION OF THE ISSUE, ESPECIALLY AS THE COMPLICITY OF PETITIONERS IN EVERYTHING WHICH OCCURRED IS SO GROSS AND SO PLAIN.

Petitioners desire for this Court to deal with the concept of imputed criminal responsibility; it has already done so, finding it altogether permissible for a conspirator to be held accountable for substantive crimes committed in the course of the conspiracy by his coconspirators. Pinkerton v. United States, 328 U.S. 640 (1946); see also I WHARTON'S CRIMINAL LAW AND PROCEDURE (Anderson ed. 1957) §97 at 194-196. In any event, even if some restrictions were to be applied, they could not reasonably benefit Petitioners, who were inextricably involved in every aspect of the criminal scheme here. This case is no vehicle for modification of the Pinkerton rule.

CONCLUSION

Petitioners' trials were fundamentally fair in all respects, and their death penalties are both legal and proportionate to the wickedness of their conduct. This Court should therefore decline to review this case.

Respectfully submitted,

ROBERT K. CORBIN
The Attorney General

Bruce M. Ferg
BRUCE M. FERG
Assistant Attorney General
Attorneys for Respondent

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Pima)

BRUCE M. FERG being first duly sworn on oath deposes and says: He is an Assistant Attorney General for the State of Arizona and as such did cause to be deposited in the U.S. Mail, postage prepaid, two (2) copies of the foregoing to

Alan M. Dershowitz
20 Elmwood Avenue
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Counsel for Petitioners

Stephen H. Oleskey
HALE AND DORR
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Boston, MA 02109
Counsel for Petitioners

and one (1) copy each to:

Ricky Tison

Raymond Curtis Tison

Bruce M. Ferg
BRUCE M. FERG

SUBSCRIBED AND SWORN to before me this 4th day of December, 1981.

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No. 81-5634

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

RICKY WAYNE TISON and
RAYMOND CURTIS TISON,

Petitioners

v.

STATE OF ARIZONA,

Respondent

PETITIONERS' REPLY TO THE RESPONSE BY THE STATE OF ARIZONA TO THE JOINT PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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REASONS FOR GRANTING THE WRIT

I. The decisions below in the petitioners' cases present the issue of whether someone not proven to have participated in the actual killing or to have intended death can constitutionally be executed.

In its Response to petitioners' joint request for a writ of certiorari, Arizona now argues at length that the Tisons' involvement in the killings was more significant than was proven or even argued at trial. In sharp contrast to Arizona's present position, its prosecutor repeatedly argued to the jury in both trials that Ricky and Raymond were not the actual killers but were guilty under a combination of vicarious liability and felony murder rules. In Ricky Tison's trial, the prosecutor argued, "His participation was to pull a gun on the people and to aid in the robbery and kidnap," (Ricky's Tr. 2/27/79 at 581), and "Ladies and Gentlemen, the defendant in this case participated. He was an aider and abettor. He conspired with the persons who did the murders. He is responsible for those murders ..." (Id. at 598). See also id. at 577, 584-85, 588, 626. In Raymond Tison's trial the prosecutor argued "...[I]n this case we have a situation where the defendant is a conspirator with other persons and those other persons killed somebody during these offenses." (Raymond's Tr. 3/2/79 at 395). See also id. at 386, 392-93. The judge who sentenced petitioners found as a mitigating circumstance the fact that they were convicted "under the felony murder instructions." (64a). Finally, the Supreme Court of Arizona specifically found, in affirming their sentences of death, "That they did not specifically intend that the Lyonses and Theresa Tyson die, that they did not plot in advance that these homicides would take place or that they did not actually pull the triggers on the guns which inflicted the fatal wounds is of little significance." (32a-33a).

Even the State concedes, as it must, that the Arizona Supreme Court has posed and decided the issue of the propriety of the death sentence for one not proven to have personally killed or intended death. (Response at 3). Although respondent continues to spar with the evidence presented in the case, it states that the Arizona Supreme Court "held that even if Petitioners were right, it would not relieve them of culpability." (Id.)

Arizona, having prosecuted and convicted the Tisons under one set of facts and theories of liability, cannot now properly jettison those facts and theories solely in order to gain the presumed tactical advantage of more closely associating Ricky and Raymond with actual participation in the killings.

Arizona, in its attempt to distinguish these cases from Lockett v. Ohio, 438 U.S. 586 (1978) and Enmund v. Florida, 399 So.2d 1362 (1981), cert. granted, No. 81-5321, argues that Lockett involved an accidental killing and Enmund "apparently was not present" when the killings occurred. (Response at 3-4). However, an analysis of the record in those cases demonstrates that there was actually more evidence available concerning intent to murder and participation in the killings in both those cases than is present here. In Lockett v. Ohio, supra, Justice White noted that "the facts in both of these cases might well permit the inference that the petitioners did in fact intend the death of the victims," id. at 627 (White, J., concurring in part, dissenting in part, and concurring in the judgment). Justice Blackmun noted that the witness who testified that the killing had been accidental was none other than the triggerman. Id. at 614 n.1 (Blackmun, J., concurring in part and concurring in the judgment). Similarly, in Enmund v. Florida, supra, although the Florida Supreme Court concluded that the jury probably inferred that Enmund was not present at the scene of the killings, Enmund

v. State, supra 399 So.3d at 1370, it appears that some evidence was presented that Enmund was in fact the actual killer. See id. at 1372. This Court properly considered both these cases in accordance with the theories upon which they were prosecuted and argued in the state courts on appeal. Cf. Robinson v. California, 370 U.S. 660 (1962). This Court can do no less here.

There is absolutely no evidence that either Ricky or Raymond Tison killed anyone. The overwhelming and unrebutted evidence presented at trial was that Gary Tison and Randy Greenawalt killed all the victims. (Petition at 11; 3a). That is the theory upon which these cases were submitted to the jury and to the Arizona courts. That is the theory upon which this Court should decide these petitions.

Arizona's claim that petitioners were given "individualized sentencing consideration" indicates that it misses the thrust of petitioners' argument on this point. (Response at 4-5). The State does not dispute the fact that aggravating circumstances which pertained to the actions of the actual killers were applied to petitioners. (Petition at 17). The State feels that, nevertheless, "[p]etitioners were given all the individualized consideration to which they were entitled" (Response at 5). The issue remains, nevertheless, whether the consideration the Tisons received is constitutionally sufficient.

Finally, contrary to the State's assertion (Response at 6), petitioners never disputed the proposition that a defendant should bear the burden of proving mitigating circumstances. What the Tisons argue is that it is constitutionally impermissible to rephrase a factor which in substance can only properly be considered an aggravating circumstance and make the defendant prove the converse as a mitigating circumstance. The degree of a defendant's participation in a crime, upon which Arizona requires a capital defendant bear the burden of proof, is such a factor. See Laws 1973, Ch. 138, §5, Ariz. Rev. Stat. Ann. §13-454(F)(3) (Supp.. 1957-1978) (Repealed 1978) (107a).

This Court has recently indicated its willingness to decide whether someone can constitutionally be executed if he has not been proven to have personally killed or intended death, by grating certiorari in Enmund v. Florida, No. 81-5321. Petitioners would like to assist in the resolution of this issue by presenting this Court with a thorough argument, based on the Anglo-American history of the felony murder and aiding and abetting rules, against the application of the death penalty in the circumstances presented by this case.

II. Petitioner Ricky Tison's case presents this Court with an excellent opportunity to determine whether a mere failure by the defense attorney to use the single word "Miranda" constitutes a waiver of an otherwise fully litigated constitutional issue, and to reaffirm the standards for determining the voluntariness of a statement.

Arizona's argument that both Ricky Tison and this Court have misread a crucial distinction historically made by its courts between presentation of the "voluntariness" issue on the one hand and the nonwaiver of Miranda rights on the other is supported neither by logic nor by the very decisions of its own Supreme Court it excerpts at such length. (Response at 13-16). As these excerpts show, and as the Arizona Attorney General implicitly conceded in briefing before the Arizona Supreme Court (a concession his office now apparently regrets), in Arizona the question of compliance with Miranda has since that decision been subsumed within the broad issue of voluntariness exactly as Ricky Tison's attorney argued in the suppression hearings. See, e.g., State v. Arnett, 119 Ariz. 38, 579 P.2d 542 (1978), cited by Respondent at 15.

Arizona's argument on this point represents a somewhat belated conversion from an argument of State compliance with Miranda (Brief for Appellee at 17-23, State v. Ricky Wayne Tison, No. 4612 (Ariz.)) to a wholly opportunistic reliance on a waiver argument following the Arizona Supreme Court's murky pronouncement on this point in the decision below. (13a).

In any event, the issue presented here is not whether Ricky Tison's statements were obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966),[1] but whether the finding of the Arizona Supreme Court that these arguments had been waived presents an issue worthy of review by this Court. Ricky Tison contends that since he did not waive the Miranda issues, his case presents an excellent vehicle for clarifying the proper standards for finding an intentional waiver by defense counsel of federal constitutional issues.

Whether there was compliance with Miranda was the subject of questioning by both the prosecutor (122a-124a, 138a, 139a, 152a, 153a, 160a-161a) and the defense attorney (128a, 164a) at the suppression hearing. Ricky's attorney questioned one of the officers concerning Ricky's refusal to sign a waiver of what were obviously Miranda rights (164a), and argued in closing that "the action of refusing to sign that waiver indicates that he either did not understand the rights or he wasn't ready to waive them." (167a). The trial judge's finding that "I think they understood their rights and waived them" was not an "after-

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[1] Arizona claims that at least the last of the three statements obtained from petitioner Ricky Tison was elicited in compliance with Miranda v. Arizona, 384 U.S. 436 (1966), because it was "separated substantially by both time and distance from the original questioning, conducted by a different person from a different agency, and preceded by a completely renewed advisement of rights." (Response at 11). Therefore Arizona asserts taht this statement is comparable to that found admissible in Michigan v. Mosley, 423 U.S. 96 (1975). Even if Arizona's contention were factually accurate, the first two statements elicited from Ricky Tison remain undefended, and thus the issue of whether the State of Arizona complied with Miranda would remain. However, Ricky Tison's third statement is not comparable to that found admissible in Mosley. In Mosley the issue presented to the Court was whether an interrogation by a Detective Hill was a per se violation of Miranda after the defendant had invoked his right to remain silent during an earlier interrogation by Detective Cowie. This Court specifically stated "[i]n short, there is no claim that the procedures followed during Detective Hill's interrogation of Mosley, standing alone, did not fully comply with the strictures of the Miranda opinion." Michigan v. Mosley, supra, 423 U.S. at 98. Here, on the contrary, counsel vigorously argued below that the procedures followed during all three interrogations of petitioner Ricky Tison were in violation of Miranda. Brief for Appellant at 36-45; Reply Brief for Appellant at 12-18, State v. Ricky Wayne Tison, No. 4612 (Ariz.).

thought," as claimed by Arizona (Response at 13) but was clearly in response to Ricky Tison's attorney's argument that the interrogation following Ricky's refusal to sign the waiver violated Miranda. The issues were then fully argued by both sides at the state appellate level. Arizona now grudgingly explains that the Attorney General merely "responded to the issues as framed by petitioner in the appeal and in doing so overlooked the waiver." (Response at 16). In fact, as the record demonstrates, both parties clearly believed that the Miranda issues had been properly preserved until the Arizona Supreme Court inexplicably held otherwise.

That Court's decision gives no indication of how defense counsel had knowingly and intentionally waived this fully litigated issue, but merely said that there was a "failure to raise these issues at the suppression hearing." (13a). The only possible basis for this holding is that at the suppression hearing defense counsel did not use the word "Miranda" (although the prosecutor did on several occasions, 124a, 137a-138a, 153a) but instead spoke of "[Ricky Tison's] rights," and "invoke[ing] his right to remain silent." (165a -167a).

No precedent cited by respondent supports a finding of waiver under those circumstances. The objection was neither untimely as in Henry v. Mississippi, 379 U.S. 443 (1965), nor apparently deliberately bypassed as in Estelle v. Williams, 425 U.S. 501, 510 (1976). Picard v. Connor, 404 U.S. 270 (1971), cited by Arizona for the proposition that failure to recite in haec verba results in the waiver of constitutional rights (Response at 17), in fact stands only for the proposition that "the substance of a federal habeas corpus claim must first be presented to the state courts." Id. at 278 (emphasis added). Here, the essence of the Miranda claim, and everything but the invocation of the word "Miranda" by petitioner's attorney, was presented, litigated and decided below. Thus the case presents an

excellent opportunity for this Court to determine whether a state court may properly find a waiver of federal constitutional rights under such circumstances.[2]

Finally, respondent argues that this Court need not take this occasion to re-emphasize the standards for determining when a confession is voluntary "because the only reasoned conclusion available is that Petitioner's statements were voluntary." (Response at 18). Arizona's "conclusion" on this point is remarkable in view of the record of Ricky's custodial questioning. In flat contradiction to Arizona's factual assertions (Response at 18), the record indicates that Ricky Tison was not only nude when questioned but, as the Arizona Supreme Court pointed out, lacked even a blanket to wrap around him at the third interrogation (15a). Moreover, Arizona's superficial reading of Malinski v. New York, 324 U.S. 401 (1945), as according "little weight" to the fact that the defendant, Malinski, was stripped prior to his confession, is refuted by the very language of that case. Justice Douglas' opinion, strongly concurred in by Justice Frankfurter, clearly found Malinski's nudity to be a major

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[2] Henry v. Mississippi, supra, also implies that where a state procedural rule is not "clearly announced to defendant and counsel," the State's insistence on compliance may not serve a legitimate state interest that outweighs a defendant's interest in vindicating his constitutional rights. Id. at 447, 448 n.2. Petitioner claims that under Arizona law, prior to his case, counsel could assume that a request for a voluntariness hearing would be treated as a request for a hearing on Miranda issues as well. (Joint Petition at C18). Arizona, however, claims that its courts have always maintained a distinction between voluntariness and Miranda issues. (Response at 14).

In support of this argument, Arizona asserts that this Court misread the case law that served as the predicate for the recent decision of Edwards v. Arizona, ___ U.S. ___ , 68 L.Ed.2d 378 (1981). Arizona then proceeds to attempt to relitigate that case (in addition to gratuitously attacking the Miranda decision it lost fifteen years ago) by discussing why "'voluntary' means different things in different contexts." (Response at 13-14). Arizona finds distinctions between the treatment of voluntariness and Miranda issues in Arizona that were not visible to this Court in Edwards v. Arizona, supra, 68 L.Ed.2d at 386, and that are confusing even as set forth in the Response. Even if Arizona were correct that the distinctions had been made, the procedural rule was obviously not clear enough to allow forfeiture of petitioners' rights under Henry.

element of the coercion applied to him. See id. at 403, 405, 407, 417; Miranda v. Arizona, supra, 384 U.S. at 452 n.17.[3] Furthermore, Malinski's confession was made six hours after he had been given his shoes, socks, underwear, and a blanket. Malinski v. New York, supra, 324 U.S. at 403. Ricky Tison's statements were much closer to the "clear case" of coercion there described by this Court, "the product of persistent questioning while [he] stood stripped and naked ..." Id. at 405.

Lastly, Arizona cites Haynes v. Washington, 373 U.S. 503 (1963), a pre-Miranda decision, for the proposition that "substantial deference will be given to the findings of the trial court, even on the ultimate question of voluntariness." (Response at 18). While that Court observed that "the determination of the trial judge ... may be entitled to some weight even with respect to the ultimate conclusion on the crucial issue of voluntariness", it flatly stated that it was "required" to make an "independent determination" as to the existence of coercion. It then found that Haynes' confession, from "the facts presented," had been coerced. Id. at 515. Ricky Tison asks this Court to grant review in order to reinvigorate this basic standard in the context of his case.

III. The Arizona Supreme Court's failure to review the correctness of the conspiracy instructions given to the juries in the Tisons' cases presents important issues concerning the requirements of basic due process of law in a capital case.

Arizona concedes that the Arizona Supreme Court "declined to go into whether or not the four formal elements of the crime of conspiracy had been enunciated ..." in the jury instructions concerning conspiracy. (Response at 19). Petitioners' contention on this issue is not fundamentally challenged and the

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[3] Arizona's citation to United States v. Duvall, 537 F.2d 15, 23 (2d Cir.), cert. den., 426 U.S. 950 (1976) is surprising in view of the fact that the Circuit Court there stated "Moreover while the strip search in this case was an unnecessary indignity, it is a long way from the conduct in Malinski v. New York ... where the police kept Malinski naked for three hours and only partially dressed for another seven, during which period his confession was obtained."

question remains whether this failure of appellate review on the correctness of fundamental jury instructions in a capital case violates due process of law.

Arizona attempts to characterize this issue as wholly one of state law both by arguing that the Arizona Court reviewed other aspects of the conspiracy instructions and by reiterating the principle that state courts are the ultimate authority concerning construction of state law. (Response at 19). However, the fact that the Arizona Court reviewed one aspect of the conspiracy instructions does not alter the significance of its refusal to review the Tisons' "arguments that the instruction did not reflect the law of the substantive crime of conspiracy." (17a, 39a). Furthermore, the issue of what a state interprets its laws to be is entirely different from the issue presented when a state declines to even render an interpretation of those laws. While the former may ordinarily be a question for the state courts, the issue of whether state laws and procedures comport with due process is a federal question. See Mullaney v. Wilbur, 421 U.S. 684, 691-92 (1975).

IV. The Tisons' cases present the issue of how attenuated a causal connection there may be between the defendant's acts and the victim's death before due process bars the State from holding him vicariously liable for murder.

The Tisons as petitioners maintain that due process places limits on the extent to which a State may find one criminally liable for the acts of another, and that the jury instructions in their cases permitted the juries to exceed these limits. Therefore, their cases present this Court with an opportunity to clarify those limits.

Arizona claims that this Court in Pinkerton v. United States, 328 U.S. 640 (1946) determined this issue. This argument is in error. In Pinkerton, this Court held that someone charged with and convicted of the crime of conspiracy could also be held responsible for substantive crimes committed by his co-conspirators in furtherance of the conspiracy. The Tisons, however, were

neither charged with nor convicted of the crime of conspiracy. Their murder convictions cannot therefore find support in Pinkerton. Rather, "conspiracy" was but one of a potpourri of vicarious liability theories and broad definitions offered to the juries to link together as they saw fit if they intended to convict petitioners of murder. As noted in the Petition, the trial court's instructions would permit someone who put gas in the getaway car before the prison escape to be convicted of first degree murder. (Joint Petition at C24). Petitioners therefore believe that this case presents a clear-cut opportunity for this Court to clarify the due process limits on such vicarious liability.

When petitioners originally filed their joint petition for writs of certiorari on October 27, 1981, it was accompanied by a motion to expedite consideration and to consolidate for hearing with Enmund v. Florida, No. 81-5321, cert. granted October 19, 1981. This Court denied the motion on November 2, 1981. If the Court decides to review their cases on the Eighth Amendment issue, petitioners remain fully prepared to meet whatever expedited briefing schedule the Court may require so as to enable their cases to be argued at the same time as Enmund v. Florida.

CONCLUSION

For the reasons stated above, Petitioners request that this Court grant their joint petition for writs of certiorari.

Respectfully submitted, this 16th day of December 1981.

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